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Dane S. Ciolino

Gary R. Roberts

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THE MISSING DIRECT-TENDER OPTION IN FEDERAL THIRD-PARTY PRACTICE: A PROCEDURAL AND JURISDICTIONAL ANALYSIS

DANE S. CIOLINO[†]
GARY R. ROBERTS^{††}

Under the present Federal Rules of Civil Procedure, third-party practice under Rule 14 in nonadmiralty cases is limited to "indemnity impleader." Thus, a defendant in a civil action may not implead a third party unless the defendant has a right of indemnity or contribution against that third party for all or part of the plaintiff's claim. By contrast, a defendant in an admiralty action may also implead third parties who may be liable to the plaintiff directly. The authors refer to admiralty's more liberal third-party practice as "tendered-defendant impleader."

In this Article, Mr. Ciolino and Professor Roberts explain the historical reasons for the divergence between civil and admiralty third-party practices. They discuss the practical advantages and policy objectives achieved by direct-tender practice and conclude that the Federal Rules should retain admiralty's tendered-defendant impleader and adopt it for all civil cases.

I. INTRODUCTION

Federal Rule of Civil Procedure 14(a) permits a defendant to implead a third party "who is or may be liable to [that defendant] for all or part of the plaintiff's claim against him."¹ This rule enables the defendant to recoup all or part of any money judgment entered against him in favor of the plaintiff. The impleaded third party ultimately can be liable *only* to the defendant, however, and only if the defendant is liable to the original plaintiff.² Such "indemnity

[†] Member of the New York Bar. Associate, Cravath, Swaine & Moore, New York City. B.A. 1985, Rhodes College; J.D. 1988, Tulane Law School.

^{††} Professor of Law, Tulane Law School. B.A. 1970, Bradley University; J.D. 1975, Stanford Law School.

1. FED. R. CIV. P. 14(a).

2. Thus, under rule 14(a) the third party's liability must be derivative rather than direct. *E.g.*, *Hartford Accident & Indem. Co. v. Sullivan*, 846 F.2d 377, 381 (7th Cir. 1988) (rule 14(a) only applicable when the "third-party's liability [is] derivative"), *cert. denied*, 109 S. Ct. 2428 (1989); *Forum Ins. Co. v. Ranger Ins. Co.*, 711 F. Supp. 909, 915 (N.D. Ill. 1989) (rule 14(a) "impleader is proper only when the third-party defendant [is derivatively] liable . . . to the third-party plaintiff"); *Harrison v. Glendel Drilling Co.*, 679 F. Supp. 1413, 1422 (W.D. La. 1988) ("a defendant has no right under Rule 14(a) to implead a non-party who is [directly] liable to plaintiff"). *See generally* 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1446 (1971 & Supp. 1988) [hereinafter 6 WRIGHT & MILLER] ("The secondary or derivative liability notion is central" to as-

impleader" actions most commonly include claims for indemnity or contribution.

By contrast, rule 14(c)³ does not limit third-party practice to indemnity impleader.⁴ It permits a defendant to implead a third party "who may be

serting a third-party claim under Rule 14(a)); 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14 (1989) (analyzes rule 14, including explanation of derivative liability requirement of rule 14(a)).

A defendant, however, also can assert *nonderivative* claims against third parties. The outcome of such direct claims does not depend upon the outcome of the original plaintiff's claim against the defendant. There are at least two situations in which such affirmative claims might arise.

First, when the defendant brings either a counterclaim against the plaintiff, *see* FED. R. CIV. P. 13(a), (b), or a cross-claim against a codefendant, *see id.* rule 13(g), the defendant (that is, the counterclaim/cross-claim plaintiff) can join additional codefendants on the counterclaim or cross-claim. *See id.* rule 13(h). The claims against those additional parties, however, must arise out of "the same transaction, occurrence, or series of transactions or occurrences" as the counterclaim or cross-claim. *See id.* rules 13(h), 19 & 20.

Second, when the defendant impleads a rule 14(a) third party, he may join any additional claims that he has against that third party. *See id.* rule 18(a). In this situation, the federal rules do *not* require that such claims arise out of the same "transaction or occurrence" as the rule 14(a) claim or as the plaintiff's claim. Thus, if such a claim had an independent basis of jurisdiction (for example, if it presented a federal question or if the defendant and the third party were of diverse citizenship), it would be permissible. If a defendant joined such an unrelated claim, however, most courts likely would exercise their authority under federal rule 42 and sever the claim for trial. *See id.* rule 42(b). Nevertheless, the unrelated claim would be part of the suit for pretrial purposes (including discovery), and thus could put an enormous burden on the plaintiff who has nothing to do with the unrelated dispute. Although this situation seems unjustifiable, the existing Federal Rules permit it. *See id.* rule 14(a).

3. Rule 14(c) provides as follows:

When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

FED. R. CIV. P. 14(c).

4. Both rule 14(c) and rule 14(a) permit typical "indemnity" impleader. Some courts have failed to recognize this, however. For example, in *Rosario v. American Export-Isbrandtsen Lines*, 531 F.2d 1227 (3d Cir.), *cert. denied*, 429 U.S. 857 (1976), the United States Court of Appeals for the Third Circuit held that rule 14(c) was "inapplicable" because the defendant sued the third-party defendant seeking judgment in its favor and not in favor of plaintiff. *Id.* at 1232-33.

Despite some confusion on this point, the majority of courts have used rule 14(c) unreservedly for indemnity impleader. *See, e.g., Parks v. United States*, 784 F.2d 20 (1st Cir. 1986); *Parker v. Gulf City Fisheries*, 803 F.2d 828 (5th Cir. 1986); *Jefferson Barracks Marine Serv. v. Casey*, 763 F.2d 1007 (8th Cir. 1985); *Hillier v. Southern Towing*, 714 F.2d 714 (7th Cir. 1983); *In re Oil Spill by the Amoco Cadiz*, 699 F.2d 909 (7th Cir.), *cert. denied*, 464 U.S. 864 (1983); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035 (5th Cir. 1982); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *Tri-State Oil Tool Indus. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969); *American Home Assurance Co. v. L & L Marine Serv.*, 688 F. Supp. 502 (E.D. Mo. 1988), *aff'd in part, vacated in part*, 875 F.2d 1351 (8th Cir. 1989); *Lewis v. M/V Pablo*, No. CIV. A. 86-1287 (E.D. La. Jan. 14, 1987) (WESTLAW, FADM-CS database); *Duhon v. Koch Exploration Co.*, 628 F. Supp. 925 (W.D. La. 1986); *Exxon Chem. Int'l Supply, S.A. v. M/V Agia Skepi*, No. 82 Civ. 0144, slip op. (S.D.N.Y. Sept. 17, 1982) (LEXIS, Admty library, Uscts file); *In re Sedco, Inc.*, 543 F. Supp. 561 (S.D. Tex. 1982), *vacated in part*, 610 F. Supp. 306 (1984); *Nynaes Petroleum AB v. Transworld Oil, Ltd.*, 1981 A.M.C. 675 (S.D.N.Y. 1980); *United States v. Bath Iron Works Co.*, No. 77 Civ. 2817 (S.D.N.Y. 1980) (LEXIS, Admty library, Uscts file); *Gauthier v. Crosby Marine Serv.*, 87 F.R.D. 353 (E.D. La. 1980); *Tatlow & Pledger (PTY), Ltd. v. Hermann Forwarding Co.*, 456 F. Supp. 351 (S.D.N.Y.

wholly or partly liable . . . to the *plaintiff* . . . on account of the same transaction, occurrence, or series of transactions or occurrences."⁵ Once the defendant "demand[s] judgment against the third-party defendant in favor of the plaintiff,"⁶ "the action . . . proceed[s] as if the plaintiff had commenced it against the third-party defendant as well as the [original defendant]."⁷ In such a case, the tendered third party must answer the relevant claims in the plaintiff's complaint in

1978); *Northern Contracting Co. v. C.J. Langenfelder & Son, Inc.*, 439 F. Supp. 621 (E.D. Pa. 1977); *Morse Electro Prods. Corp. v. S.S. Great Peace*, 437 F. Supp. 474 (D.N.J. 1977); *Oroco Marine, Inc. v. National Marine Serv.*, 71 F.R.D. 220 (S.D. Tex. 1976); *Sanchez v. Loyd W. Richardson Constr. Corp.*, 56 F.R.D. 472 (S.D. Tex. 1972); *Cantey v. Flensburger Dampfercompagnie Harald Schultdt & Co.*, 55 F.R.D. 127 (E.D.N.C. 1971); *McCann v. Falgout Boat Co.*, 44 F.R.D. 34 (S.D. Tex. 1968). In any event, it is ultimately inconsequential whether courts utilize rule 14(c) or rule 14(a) in this context; there are no principled distinctions between indemnity impleader under rule 14(c) and rule 14(a). See 6 WRIGHT & MILLER, *supra* note 2, § 1465, at 346 ("Rule 14(c) indemnity claims should not be treated any differently than Rule 14(a) indemnity claims . . ."); Note, *Admiralty Practice After Unification: Barnacles on the Procedural Hull*, 81 YALE L.J. 1154, 1176 (1972) ("unification has created a single procedure with respect to indemnity claims, notwithstanding their separate mention in Rule 14(c)"). Why rule 14(c) contains this redundant indemnity impleader provision is unclear. See *infra* note 24.

5. FED. R. CIV. P. 14(c) (emphasis added).

6. *Id.*; see *Campbell Indus. v. Offshore Logistics Int'l*, 816 F.2d 1401, 1406 (9th Cir. 1987) (defendant must "demand judgment" to invoke rule 14(c)); *Northern Contracting*, 439 F. Supp. at 623 n.1 ("[N]otwithstanding [defendant's] reference to FED. R. CIV. P. 14(c), the third-party complaint does not demand judgment against [third party] to be entered in favor of plaintiffs."); *Rosario v. American Export-Isbrandtsen Lines*, 395 F. Supp. 1192, 1194 (E.D. Pa. 1974) (Memorandum and Order) ("[T]he defendant and 3rd party plaintiff did not demand judgment in favor of plaintiff but rather demanded judgment in favor of itself. Consequently, the government must be treated as a true [indemnity] 3rd party defendant for all purposes."), *rev'd*, 531 F.2d 1227 (3d Cir.), *cert. denied*, 429 U.S. 857 (1976).

7. FED. R. CIV. P. 14(c); see also *Campbell*, 816 F.2d at 1406 ("When the admiralty defendant elects to require the third-party defendant to answer the plaintiff's complaint directly, the court treats the action as if the plaintiff had commenced it against the defendant and third-party defendant jointly."); *Riverway Co. v. Trumbull River Servs.*, 674 F.2d 1146, 1154-55 (7th Cir. 1982) (Under Rule 14(c), third-party complaint demanded that the court treat the "action as if [plaintiff] had commenced it against [third-party defendant and original defendant] as joint defendants."). For procedural purposes courts usually do follow the mandate of rule 14(c) and approach tendered-defendant claims "as if" commenced by the plaintiff against the third-party. A number of examples illustrate this significant practical difference from indemnity third-party practice.

First, individuals suing the United States must submit certain claims to the appropriate government agency prior to filing suit. See Federal Tort Claims Act, 28 U.S.C. § 2675(a) (1976). If a defendant tenders the United States to a plaintiff on such a claim, the plaintiff arguably first must submit that claim to the agency. Cf. *Rosario v. American Export-Isbrandtsen Lines*, 395 F. Supp. 1192, 1194 (E.D. Pa. 1974) (court recognized but did not resolve this issue), *rev'd*, 531 F.2d 1227 (3d Cir.), *cert. denied*, 429 U.S. 857 (1976).

Second, if the plaintiff and the tendered third party have *not* previously agreed to arbitration, but the defendant and that third party have, the plaintiff need not arbitrate prior to pursuing the tendered claim. *McSwegan v. United States Lines*, 688 F. Supp. 867, 872 (S.D.N.Y. 1988). Conversely, if the plaintiff and the tendered third party *have* agreed to arbitrate, the plaintiff should not be able to pursue the tendered third party prior to invocation of the alternative dispute resolution procedure. But see *United States v. Bath Iron Works*, No. 77 Civ. 2817 (S.D.N.Y. 1980) (LEXIS, Admty library, Uscts file) (court allowed the plaintiff to proceed against a tendered defendant despite mutually agreed upon "disputes clause" requiring exhaustion of administrative remedies).

Third, a tendered third-party defendant is eligible for reimbursement of costs and fees incurred through defending against a plaintiff's claim to the same extent as is a defendant that plaintiff sues directly. See *Campbell*, 816 F.2d at 1406 (tendered third party defended against defendant's indemnity claim as well as plaintiff's anchor claim).

Fourth, unlike an indemnity third-party defendant, a tendered third party is not necessarily released when the plaintiff dismisses the original impleading defendant. The tendered defendant must continue to defend against the plaintiff's direct claim as would any other defendant that the plaintiff sued originally. See *Avery v. United States*, 829 F.2d 817 (9th Cir. 1987); cf. *Gauthier v.*

addition to the third-party complaint.⁸ If ultimately liable, the third party must pay damages directly to the original plaintiff.⁹ In effect, rule 14(c) allows the original defendant to tender an *additional* defendant to the plaintiff, from whom the plaintiff can then recover directly. To distinguish this form of third-party practice from "indemnity impleader," several courts and commentators have used the misleading term "substitute defendant" impleader.¹⁰ However, because the original defendant is not relieved of potential liability, the tendered third party is not really a "substitute"; hence, this Article instead characterizes this practice as "tendered-defendant impleader."

Although rule 14(c) impleader is significantly more liberal than rule 14(a) impleader,¹¹ defendants rarely may use it. This is so because rule 14(c) is applicable only when at least one of the plaintiff's claims against the defendant is an admiralty claim.¹² But this has not always been the case.

Crosby Marine Serv., 87 F.R.D. 353 (E.D. La. 1980) (plaintiff who dismisses charges against one defendant may remain a third-party defendant to cross-claims asserted by a remaining defendant).

Fifth, the proper party to dismiss a tendered third party defendant voluntarily is the plaintiff to whom the party was tendered—not the defendant who originally impleaded the third party. See *Turner v. Central Marine Serv.*, No. 87-755 (E.D. La. entered March 13, 1989) (Order of Dismissal).

Finally, the statute of limitations on a plaintiff's tendered claim tolls when the defendant tenders the third party to the plaintiff. On that date, courts consider the plaintiff to have "commenced" the action against the third party. *Lewis v. M/V Pablo*, No. CIV. A. 86-1287 (E.D. La. Jan. 14, 1987) (WESTLAW, FADM-CS database). In contrast, when the defendant impleads a third party for indemnity, the statute of limitations on the *defendant's* indemnity claim tolls on the date that the plaintiff filed suit against the original defendant. *Id.*

For a discussion of how courts should treat tendered defendant claims *jurisdictionally*, see *infra* notes 94-205 and accompanying text.

8. FED. R. CIV. P. 14(c); see, e.g., *Campbell*, 816 F.2d at 1406; *Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 313 (2d Cir. 1985). Compare FED. R. CIV. P. 14(a) (third-party defendant need only answer third-party complaint) with *id.* 14(c) (third-party defendant must also answer plaintiff's complaint).

9. See, e.g., *Riverway*, 674 F.2d at 1154; *Ohio River Co. v. Continental Grain Co.*, 352 F. Supp. 505, 512-13 (N.D. Ill. 1972).

10. See, e.g., Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 MICH. L. REV. 1627, 1652-53 & n.143 (1976); Note, *supra* note 4, at 1172.

11. The liberality of rule 14(c) extends beyond its tendered-defendant provision. See *infra* note 25.

12. E.g., *Tipton v. General Marine Catering Co.*, No. 87-4647, slip op. (E.D. La. Feb. 13, 1989) (LEXIS, Admtry library, Uscts file); *Harrison v. Glendel Drilling Co.*, 679 F. Supp. 1413, 1417-19 (W.D. La. 1988) (because "plaintiff's action is . . . a suit at law [not admiralty] . . . defendants are not entitled to invoke the benefits of Rule 14(c)"). Whether a claim is an "admiralty or maritime" claim for purposes of rule 14(c) is governed by rule 9(h). Under that rule, courts may classify a plaintiff's cause of action as an "admiralty . . . claim" under two circumstances.

First, courts consider a claim to be an admiralty claim by default, when only admiralty jurisdiction, see 28 U.S.C. § 1333 (1982), could support the plaintiff's claim. E.g., *Truehart v. Blandon*, 685 F. Supp. 956, 957 (E.D. La. 1988) (rule 9(h) designation implied when plaintiff brings an in rem claim falling within the federal courts' exclusive admiralty jurisdiction); *Mitsubishi Int'l Corp. v. International Great Lakes Shipping Co.*, No. 83 C 1059 (N.D. Ill. Dec. 16, 1985) (WESTLAW, FADM-CS database); see also, e.g., FED. R. CIV. P. 9(h) (If "[a] claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not."); T.N.T. Marine Serv. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585, 588 (5th Cir.) ("an action against a vessel in rem falls within the exclusive admiralty jurisdiction"), *cert. denied*, 464 U.S. 847 (1983). See generally 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1313, at 452-55 (1969 & Supp. 1987) [hereinafter 5 WRIGHT & MILLER] ("If only grounds for admiralty jurisdiction are shown in the pleading, the claim will be governed by the special [admiralty] rules even in the absence of an identifying statement.").

Second, courts consider a claim to be an admiralty claim when *both* admiralty jurisdiction *and* another basis of federal jurisdiction are viable alternatives, and the plaintiff designates the claim as a

When promulgated with the Federal Rules in 1938,¹³ rule 14 allowed any civil defendant to implead a third party "who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him."¹⁴ Nevertheless, when civil defendants sought to tender third parties directly to plaintiffs under that rule, they often encountered significant court-imposed impediments. First, courts generally did not require unwilling plaintiffs to pursue claims against tendered third parties.¹⁵ Second, a large majority of courts refused to apply supplemental jurisdiction (pendent, pendent party, or ancillary)¹⁶ to the plaintiff's

rule 9(h) "admiralty" claim. *E.g.*, *Mitsubishi*, No. 83 C 1059 (N.D. Ill. Dec. 16, 1985) (WESTLAW, FADM-CS database); *Fawcett v. Pacific Far E. Lines*, 76 F.R.D. 519, 522 (N.D. Cal. 1977) ("Neither the [defendant's] subjective intention to bring the claim in admiralty nor its belief that such a claim could only be brought in admiralty . . . is sufficient to excuse the lack of proper identification."); *Duhon v. Koch Exploration Co.*, 628 F. Supp. 925, 928-29 n.8 (W.D. La. 1986). See generally *Armatur, S.A. v. Standard S.S. Owners Protection & Indem. Assoc.*, 710 F. Supp. 404 (D.P.R. 1989) (citing Rule 9(h) in a complaint without any explicit statement identifying the claim as an admiralty claim is insufficient to overcome plaintiff's contrary expressions of intent); 5 WRIGHT & MILLER, *supra*, § 1313, at 453 ("If the pleading shows that both admiralty and another basis of federal jurisdiction exist, the suit will be treated as an admiralty claim . . . if the pleading . . . contains a statement identifying the claim as an admiralty or maritime claim.") (collecting cases). By forcing the plaintiff to choose between admiralty and civil jurisdiction, rule 9(h) attempts to eliminate confusion that could arise because "civil and admiralty actions are united under a single form of action." *Pipp v. Tidewater Trawlers, Inc.*, 1986 A.M.C. 2492, 2493-94 (E.D. Va. 1984) (confusion over right to trial by jury). Once a litigant indicates her "desir[e] to obtain the benefits of a particular type of law," she cannot then "reject the requirements of that type of action." *Id.*

13. See 308 U.S. 651 (1939) (presenting original federal rules prior to the 1966 unification of admiralty and civil practice).

14. 3 J. MOORE, *supra* note 2, ¶ 14.01[1.-1] (emphasis added). See generally *Harrison*, 679 F. Supp. at 1422 (noting that Rule 14(a), as originally promulgated, allowed defendant to implead a party who may be liable to the plaintiff). An analogous provision also applied in admiralty cases. See ADMIRALTY RULE 56 (repealed 1966); see also *infra* notes 20-25 and accompanying text.

15. See, e.g., *Bull v. Santa Fe Trail Transp. Co.*, 6 F.R.D. 7, 10 (D. Neb. 1946); *Delano v. Ives*, 40 F. Supp. 672, 673 (E.D. Pa. 1941); *Malkin v. Arundel Corp.*, 36 F. Supp. 948, 951 (D. Md. 1941); *Satink v. Holland Township*, 31 F. Supp. 229, 230 (D.N.J. 1940); *Crim v. Lumbermens Mut. Casualty Co.*, 26 F. Supp. 715, 718-20 (D.D.C. 1939); cf. *Baltimore & Ohio R.R. v. Saunders*, 159 F.2d 481, 483-85 (4th Cir. 1947) (defendant cannot compel plaintiff to sue third party whom plaintiff does not wish to sue, particularly where joinder of third-party defendant would defeat jurisdiction). But see *Lommer v. Scranton-Spring Brook Water Serv.*, 4 F.R.D. 104, 104-05 (M.D. Pa. 1944); *Atlantic Coast Line R.R. v. United States Fidelity & Guar. Co.*, 52 F. Supp. 177, 186 (M.D. Ga. 1943) (when third-party complaint alleges that third party is liable to plaintiff, plaintiff and third party are opposing parties regardless of whether plaintiff so elects). The majority position noted in the text suggests that if the plaintiff refused to proceed against a tendered third-party defendant, she was not precluded from subsequently raising the claim in another proceeding.

16. See, e.g., *Friend v. Middle Atl. Transp. Co.*, 153 F.2d 778, 779 (2d Cir.) (defendant may not cause third-party defendant to be brought into a federal civil action to answer to plaintiff's claim where plaintiff and third-party defendants are citizens of the same state and federal jurisdiction does not otherwise appear), *cert. denied*, 328 U.S. 865 (1946); *Thompson v. Cranston*, 2 F.R.D. 270, 271 (W.D.N.Y. 1942) (because plaintiffs and third-party defendants were citizens of same state, plaintiffs could not amend complaint to add claim against third-party defendants), *aff'd*, 132 F.2d 631 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); *Hoskie v. Prudential Ins. Co.*, 39 F. Supp. 305, 306 (E.D.N.Y. 1941) (amended complaint alleging claim against third-party defendant of same state as plaintiff nullified on grounds of lack of diversity jurisdiction); *Johnson v. G.J. Sherrard Co.*, 2 F.R.D. 164, 166 (D. Mass. 1941) (ancillary jurisdiction does not extend to plaintiff's amended complaint against third-party defendant of same state when jurisdiction is based solely on diversity); *Herrington v. Jones*, 2 F.R.D. 108, 110 (E.D. La. 1941) (court lacks jurisdiction over plaintiff's amended complaint against third-party defendant when court would lack jurisdiction if third-party defendant were an original defendant). See generally Holtzoff, *Some Problems Under Federal Third-Party Practice*, 3 LA. L. REV. 408, 419-20 (1941).

tendered claim if it lacked independent subject-matter jurisdiction.¹⁷ Because these problems appeared to render tendered-defendant practice largely illusory, the Federal Rules Advisory Committee recommended, and in 1946 the Supreme Court adopted, an amendment deleting the words "or to the plaintiff" from rule 14.¹⁸ As a result, since 1946 the Federal Rules have not allowed tendered-defendant practice in nonadmiralty civil cases.

Why tendered-defendant impleader evolved and continues to be employed exclusively in maritime actions remains uncertain.¹⁹ Undoubtedly, a major factor is simply historical. Before 1966 proctors in admiralty conducted maritime practice under specialized admiralty rules instead of the Federal Rules of Civil Procedure. Former Admiralty Rule 56, which governed maritime third party practice, permitted an admiralty defendant to "bring in any other vessel or person . . . who may be partly or wholly liable either to the *libellant* [plaintiff] or . . . [the defendant] by way of remedy over, contribution or otherwise, growing out of the same matter."²⁰ Thus, like pre-1946 federal rule 14, Admiralty Rule 56 liberally permitted defendants to implead any person who might be directly liable to the plaintiff and "to insist that the plaintiff proceed to judgment against

17. For example, the court lacked subject-matter jurisdiction over the tendered claim when either of the following conditions existed:

- (1) when both the claim against the defendant and the claim against the tendered defendant were based on diversity jurisdiction, the tendered third party would defeat complete diversity if he was a citizen of the plaintiff's state; or
- (2) when (regardless of the basis of jurisdiction supporting either the third-party claim or the plaintiff's original claim) the amount in controversy in the tendered claim was less than the statutorily prescribed amount. The amount in controversy since May 18, 1989 has been \$50,000, see 28 U.S.C. § 1332(a), as amended by Pub. L. 100-202, Title II, §§ 201 (Nov. 19, 1988); from 1958 until 1989 it was \$10,000, see Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (amending 28 U.S.C. §§ 1331 and 1332), and it was \$3000 between 1911 and 1958, see Act of March 3, 1911, ch. 231, 36 Stat. 1087, 1091. See generally E. SURRENCY, HISTORY OF THE FEDERAL COURTS 106 (1987). Since 1980, however, there has been no amount in controversy requirement for federal question cases. See Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (amending 28 U.S.C. § 1331(a)(2)).

18. 3 J. MOORE, *supra* note 2, ¶ 14.15.

19. The first court to recognize tendered-defendant impleader was the Southern District of New York in *The Hudson*, 15 F. 162, 176 (S.D.N.Y. 1883). That court noted the following reasons why liberal impleader is particularly desirable in admiralty cases: (1) to avoid inconsistent results in separate actions arising out of the same incident; (2) to avoid the cost of multiple actions; and (3) to avoid a third party disappearing before jurisdiction is properly exercised over him. *Id.* at 168-70. Although these reasons certainly justify tendered-defendant impleader, they are no more compelling in the admiralty context than in the civil context. Indeed, for precisely these reasons, rule 14(a) permits *indemnity* impleader. FED. R. CIV. P. 14(a).

Some commentators opine that the long-established practice of insuring marine risks caused admiralty courts to recognize that it was inequitable for a plaintiff judicially to compel only one of several underwriters to bear a maritime loss. See Colby, *Admiralty Unification*, 54 GEO. L.J. 1258, 1272 (1966); Comment, *Third-Party Practice in Admiralty: Ancillary Jurisdiction*, 28 SW. L.J. 1021, 1023 (1974). But why is it inequitable for one insurer to cover an entire loss? Presumably, the premium each insurer receives adequately compensates for that risk; that some insurers may avoid liability and thus receive a windfall does not make it unfair for another to bear the entire loss. Moreover, even if this justification is valid, it is now common for nonmaritime parties to be insured—often by multiple insurers. Thus, this rationale does not provide persuasive grounds for treating admiralty practice differently from civil practice.

20. ADMIRALTY RULE 56 (emphasis added) (repealed 1966).

the third-party defendant."²¹ When the Supreme Court unified admiralty and civil practice in 1966,²² it retained admiralty tendered-defendant impleader in federal rule 14(c).²³ This substantive recodification²⁴ of former admiralty rule 56 and pre-1946 federal rule 14²⁵ thus partially resurrected tendered-defendant

21. See *Frota Oceanica Brasileira v. M/V Alice St. Philip*, 790 F.2d 412, 417 n.9 (5th Cir. 1986).

22. See Order, Amendments to the Federal Rules of Civil Procedure, 383 U.S. 1031 (1966). The amendments and Advisory Committee's notes are reprinted in 39 F.R.D. 69 (1966). Despite unification, admiralty and civil practice remain distinct. See, e.g., FED. R. CIV. P. 9(h) (pleading special matters); *id.* 14(c) (impleader); *id.* 38(e) (right to trial by jury); *id.* 82 (effect on jurisdiction and venue); Supplemental Rules for Certain Admiralty and Maritime Claims. But granted unification never was intended to make admiralty and civil actions identical. See 5 WRIGHT & MILLER, *supra* note 12, § 1313, at 452 (1969) (citing *Penoro v. Rederi A/B Disa*, 376 F.2d 125, 130 (2d Cir. 1967); *Frontier Acceptance Corp. v. United Freight Forwarding Co.*, 286 F. Supp. 367, 372 (D.N.J. 1968)).

23. See FED. R. CIV. P. 14(c).

24. Because rule 14(c) recodifies former Admiralty Rule 56, admiralty defendants seeking to implead a third-party defendant for indemnity or contribution can proceed *either* under rule 14(a) or under rule 14(c). See *supra* note 4. Thus, except for its tendered-defendant provisions, rule 14(c) is redundant. It remains unclear why the drafters' treatment of rule 14(c)'s indemnity provisions is "virtually indistinguishable from the third-party practice for all civil actions under Rule 14(a)." Note, *supra* note 4, at 1176. The best explanation is probably that in their zeal to incorporate admiralty's distinctive tendered-defendant practice into the unified rules, the drafters simply reworded and inserted all of admiralty rule 56's substance into rule 14(c) without considering the overlap with rule 14(a).

25. Although the drafters of rule 14(c) essentially recodified the substance of former Admiralty Rule 56 and pre-1946 federal rule 14, they went beyond rote recodification. Whether intentionally or otherwise, they expanded the scope of those earlier rules in two significant respects.

First, under Admiralty Rule 56 the courts permitted tendering only when both the anchor claim and the tendered claim were "in admiralty." See, e.g., *Aktieselskabet Fido v. Brazillero*, 283 F. 62, 72-73 (2d Cir.), *cert. denied*, 260 U.S. 737, 742-43 (1922); *Young v. United States*, 272 F. Supp. 738, 742-43 (D.S.C. 1967); *Capital Transp. Corp. v. Thelning*, 167 F. Supp. 379, 380 (E.D.S.C. 1958); *Warner v. The Bear*, 126 F. Supp. 529 (D. Alaska 1955); see also *McCann v. Falgout Boat Co.*, 44 F.R.D. 34 (S.D. Tex. 1968) (extensively discussing former Admiralty Rule 56 and its limitation to admiralty impleader). One modern court, however, has suggested that Admiralty Rule 56 permitted tendered claims having *any* independent basis of federal jurisdiction, regardless of whether that basis was in admiralty. See *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 810 n.12 (2d Cir. 1971). The only case support for this proposition, however, is dictum in a single case in which Judge Learned Hand expressly declined to decide whether a nonadmiralty independent basis of jurisdiction would suffice for a tendered third-party claim. See *Soderberg v. Atlantic Lighterage Corp.*, 19 F.2d 286, 287-88 (2d Cir.) (L. Hand, J.), *cert. denied*, 275 U.S. 542 (1927).

Despite this limitation on former Admiralty Rule 56 practice, rule 14(c) has *no* such maritime claim condition. This is consistent with the liberal purpose of the 1966 unification: to create a single federal forum in which all related claims between parties, admiralty and nonadmiralty, could be resolved. See generally 6 WRIGHT & MILLER, *supra* note 2, § 1465 (1971 & Supp. 1989) (detailing post-unification jurisdiction over admiralty and maritime claims and related claims under Rule 14). Only one court has disagreed and held that rule 14(c) bars nonadmiralty claims tendered directly to the plaintiff. See *McCann*, 44 F.R.D. at 41-42. Even in *McCann* the court framed the issue as "whether the court . . . has [ancillary] jurisdiction over a non-maritime third-party complaint filed pursuant to Rule 14(c)." *Id.* at 40. Thus, its holding that rule 14(c) did not permit impleader perhaps reflects the court's confusion of procedural and jurisdictional issues. Other courts, citing *McCann*, have barred nonadmiralty tendered claims under rule 14(c). But the stated ground for doing so in each case was the lack of federal subject-matter jurisdiction—not that rule 14(c) gradually disallowed such claims. See *Fawcett v. Pacific Far E. Lines*, 76 F.R.D. 519, 521 (N.D. Cal. 1977); *Stinson v. S.S. Kenneth McKay*, 360 F. Supp. 674, 676 (S.D. Tex. 1973) (written by Judge Noel who also authored *McCann*); *Young*, 272 F. Supp. at 742-43.

Second, under pre-1946 rule 14 a defendant could implead only a *nonparty*. See FED. R. CIV. P. 14. In contrast to former rule 14, modern rule 14(c) allows an admiralty defendant to implead and tender directly to the plaintiff parties *already joined* in the action. See *Gauthier v. Crosby*

impleader in the Federal Rules.

This Article discusses tendered-defendant impleader, evaluates its usefulness, and concludes that it should be readopted for all civil cases. Because rule 14(c) currently allows tendered-defendant impleader in admiralty cases, this Article discusses practice under that rule to analyze procedural and jurisdictional aspects of direct-tender practice. Part II considers the practical advantages of direct-tender third-party practice. It initially explores the different circumstances under which a defendant meaningfully might employ tendered-defendant impleader. It then concludes that when such circumstances exist, tendered-defendant impleader furthers the important goals of resolving all related claims in a single lawsuit and promoting settlement.

Part III explores the two primary purported disadvantages of tendered-defendant practice. Subpart III(A) addresses the argument that tendered-defendant impleader is impotent because it cannot force plaintiffs to proceed against parties whom they otherwise would not choose to sue. It concludes that even if courts cannot compel a plaintiff to proceed involuntarily against a tendered third party, in most cases plaintiffs nevertheless will choose to pursue the tendered claim. Furthermore, even if the plaintiff is reluctant, in order to facilitate the efficient resolution of all related claims in a single proceeding, *res judicata* should bar any unasserted tendered claim that a plaintiff fails to pursue.

Subpart III(B) considers and rejects the contention that the Federal Rules should disallow tendered-defendant practice because tendered claims often lack subject-matter jurisdiction. It argues that because independent bases of federal jurisdiction often could support tendered claims, subject-matter jurisdiction issues are unlikely to arise in most cases. When this is so, mere hypothetical jurisdictional problems should not bar tendered-defendant practice. Furthermore, just to assure that tendered claims are cognizable in federal court even if they do lack an independent basis of subject-matter jurisdiction, supplemental jurisdiction arguably should extend to all tendered claims, notwithstanding the Supreme Court's apparent rejection of pendent party jurisdiction last term in *Finley v. United States*.²⁶

This Article concludes that tendered-defendant impleader furthers valuable policy objectives of the Federal Rules of Civil Procedure. Thus, the Rules not only should retain rule 14(c)'s now anomalous tendering provision in admiralty cases, but they also should readopt such a promise for all civil cases.

II. TENDERED-DEFENDANT THIRD-PARTY PRACTICE

Although tendered-defendant third-party practice is significantly more liberal than typical indemnity impleader, tendering appears useful only in limited circumstances. Nonetheless, when such circumstances exist, the practice both

Marine Serv., 87 F.R.D. 353, 354 (E.D. La. 1980); *Spearing v. Manhattan Oil Transp. Corp.*, 375 F. Supp. 764, 770 (S.D.N.Y. 1974).

26. 109 S. Ct. 2003 (1989) (Scalia, J.) (5-4 decision).

benefits the original parties and furthers significant policy goals underlying the Federal Rules.

A. Practical Benefits of Tendered-Defendant Impleader: When Tendering Is Meaningful

Tendered-defendant impleader has substantive significance only upon the coincidence of the following two circumstances: (1) when the defendant cannot fully satisfy its interests through indemnity impleader of a potentially liable third party under a derivative liability theory, and (2) when the original plaintiff has not already sued the potentially liable third party.

1. When the Defendant Cannot Fully Satisfy Its Interests Through Indemnity Impleader

If the defendant seeks to pursue a third party only under a derivative theory of liability, rule 14(a) is an adequate device for the defendant to join that potentially liable party. Under such circumstances, there is no reason why the defendant would want to tender the third party to the plaintiff; the defendant can implead the third party, assert indemnity or contribution claims, and, if appropriate, the court can order the third party to cover the defendant's direct liability to the plaintiff.²⁷

In contrast, if the defendant has no derivative claim against the potentially liable third party, indemnity impleader is an inadequate device to satisfy the defendant's interests.²⁸ Such inadequacy exists, however, only when the defendant claims that he is not culpable, but another identifiable party is. In short, rule 14(a) indemnity impleader is not adequate, and tendering is meaningful, only when the defendant alleges that the third party alone is the culpable party ("he did it, not I").²⁹ *Stinson v. S.S. Kenneth McKay*³⁰ well illustrates such a situation.

In *Stinson* a longshoreman sued a shipowner and its vessel (in rem) to recover for injuries he suffered aboard the vessel. Alleging that the plaintiff sustained *all* of his injuries while working for third parties, the defendants impleaded those parties as third-party defendants. The court correctly recognized that the third parties "owed no duty to [the defendants] . . . which would

27. See *Jefferson Barracks Marine Serv. v. Casey*, 763 F.2d 1007, 1011 (8th Cir. 1985) (defendant does not need to use 14(c) to recover from third party whom he could implead for "the purpose of contribution").

28. See *Forum Ins. Co. v. Ranger Ins. Co.*, 711 F. Supp. 909, 915-16 (N.D. Ill. 1989) (defendant could not satisfy its interests through rule 14(a) indemnity impleader because its claim against the third party was nonderivative).

29. See generally Robertson, *supra* note 10, at 1652-53 & n.144 (illustrating the difference between "indemnity" third-party practice and "substitute defendant" third-party practice. Under the former, "unless the plaintiff amends his complaint, no danger is made by or on behalf of the plaintiff against the third-party defendant, and no judgment against the third party defendant can run in favor of the original plaintiff."). For a "he-did-it-not-I" situation, see *Woods v. Sammisa Co.*, 873 F.2d 842, 845-46 (5th Cir. 1989) (admiralty defendant "denied liability").

30. 360 F. Supp. 674 (S.D. Tex. 1973).

support a cause of action"³¹ for indemnity. Furthermore, the defendants did not allege that the third parties were a *contributing* cause of the plaintiff's injuries; rather, they alleged that the third parties were the *sole* cause of those injuries. Thus, because the defendants had no viable contribution or indemnity claims, if they had joined the third parties under rule 14(a), the court would have had to dismiss the claims for improper joinder. In contrast, rule 14(c)'s tendered-defendant provision permitted the assertion of the defendants' claims. Therefore, the court could have sustained the third-party action;³² joinder and tender would have been appropriate because the third parties "may be wholly or partly liable" directly to the plaintiff.³³

Even when the only proper way to join a potentially liable third party is through tendered-defendant impleader,³⁴ a defendant might decline to do so for several reasons. First, the defendant does not stand to recover anything from a tendered defendant on the third-party claim³⁵ (unlike in the indemnity impleader situation). Because only the plaintiff can recover from a directly tendered party, it is the plaintiff—not the defendant—who apparently has the most to gain through tendered-defendant practice.

Second, irrespective of whether the defendant impleads the third party, the defendant still can defend the plaintiff's suit on the ground that the nonimplied third party is solely responsible ("he did it, not I"). This defense would

31. *Id.* at 675.

32. The *Stinson* court dismissed the tendered-defendant claims on arguably erroneous subject-matter jurisdiction grounds. *Id.* at 676; see also *infra* notes 158-64 and accompanying text (majority of courts since 1966 have allowed tendered-defendant impleader under ancillary jurisdiction, whether the third party claim is admiralty or nonadmiralty).

33. FED. R. CIV. P. 14(c); cf. *Riverway Co. v. Trumbull River Servs.*, 674 F.2d 1146, 1154 (7th Cir. 1982) (third-party defendant in 14(c) substitute defendant action unsuccessfully argued that it could not be liable directly to plaintiff because it could not have been liable to defendant).

Professor Robertson describes another case in which Rule 14(c) could have allowed a third-party claim despite the absence of an indemnitee-indemnitor relationship. Robertson, *supra* note 10, at 1653 n.144 (discussing *Donaldson v. United States Steel Corp.*, 53 F.R.D. 228 (W.D. Pa. 1971)). The *Donaldson* court dismissed the third-party complaint because no indemnity relationship existed. It failed, however, to consider applying rule 14(c). The court stated:

[T]he requirement . . . that the relationship between the defendant, as a third-party plaintiff and the third-party defendants be in reality one of plaintiff-defendant must be met. Under the circumstances of this suit, there is no such relationship between the defendant as a third-party plaintiff and the purported third-party defendants, for no relationship exists between these two parties which would give rise independently to litigation between themselves.

Donaldson, 53 F.R.D. at 230.

34. See *supra* notes 28-33 and accompanying text.

35. The defendant conceivably could recover from the tendered third party on any additional claim that he permissively joins with the tendered claim. See FED. R. CIV. P. 18(a). But such claim joinder may not be permitted under rule 18(a). That rule permits only "a party asserting a claim to relief" to join such claims. *Id.* In the tendered defendant context, the original defendant asserts no "claim to relief" of his own against the third party; he merely asserts the *plaintiff's* otherwise unasserted "claim to relief." See *infra* notes 94-114 and accompanying text. Therefore, rule 18(a) arguably does not authorize the defendant to join additional claims against the tendered defendant.

Once the tendered defendant is a party to the litigation, however, the defendant could assert *cross-claims* against him. See Fed. R. Civ. P. 13(g). But the defendant's right to do so would be significantly more restricted than his right to assert rule 18(a) claims would have been; under rule 13(g) (unlike under rule 18(a)), the claim must "aris[e] out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein." *Id.*

be technically just as viable, and might even be more persuasive if the purportedly culpable party were not in court to rebut the defendant's allegations.³⁶

For these reasons, a defendant who utilizes tendered-defendant impleader arguably is doing little more than a favor for the plaintiff. Thus, a defendant would likely hesitate before joining the purportedly culpable person as a party. Other benefits of tendered-defendant impleader inure to the benefit of the defendant, however, and often render its use more attractive than not.³⁷

a. Discovery benefits

The Federal Rules allow certain types of discovery to proceed only against parties to litigation. For example, parties may serve interrogatories only upon "other part[ies]."³⁸ Likewise, requests for production of documents and "things" and requests to inspect or survey land are available only against parties.³⁹ And, only a "party, or . . . a person in the custody . . . of a party" may be required to submit to a physical or mental exam for purposes of discovery.⁴⁰ Actually, the only discovery devices available against nonparties are depositions upon oral⁴¹ or written⁴² questions.⁴³ These discovery considerations are certainly an incentive for the defendant to implead a potentially liable third party rather than merely to defend against the plaintiff's suit; through the more extensive discovery procedures available against parties, the defendant might uncover additional evidence to support his "he-did-it-not-I" defense.

b. Evidentiary benefits

Under the Federal Rules of Evidence any statement made by a party to a suit that is offered against that party is not hearsay.⁴⁴ Therefore, if the defendant elects to implead a potentially liable third party, the defendant then could

36. Furthermore, the defendant might be able to satisfy his interests through abusing rule 14(a) impleader. To implead a rule 14(a) "indemnity" third party, the defendant need not admit any degree of liability. The defendant conceivably could implead for contribution an alleged joint tortfeasor who, purportedly along with the defendant, caused the plaintiff's injury. As the litigation progressed, the defendant could deny any liability to the plaintiff and frame the putative "indemnity" third-party defendant as the solely liable party. If that third party (or the plaintiff) failed to file a motion to dismiss for improper joinder, the matter would proceed to trial. If the factfinder then agreed with the defendant and found that the third party was solely responsible, the defendant would be exonerated from liability completely. The plaintiff, however, would be out of luck if she had failed to amend her complaint to join the third-party defendant. The court could not enter judgment against the third party in favor of the plaintiff since the plaintiff neither sued the third party directly, nor did the defendant directly tender the third party to the plaintiff.

37. See *infra* notes 38-48 and accompanying text.

38. FED. R. CIV. P. 33(a).

39. *Id.* 34(a).

40. *Id.* 35(a).

41. *Id.* 30(a) ("After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination.") (emphasis added).

42. *Id.* 31(a) ("After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions.") (emphasis added).

43. In any case, through a subpoena duces tecum the deponent can be compelled to bring documents to the deposition. *Id.* 31(b)(1).

44. See FED. R. EVID. 801(d)(2) ("A statement is not hearsay if . . . [it] is offered against a party . . .") (emphasis added).

introduce any statement made by that party without encountering hearsay problems. Such statements might include those tending to exculpate the defendant from liability. Another evidentiary incentive is that the deposition of a party or an agent of a party may "be used [at trial] by an adverse party for any purpose."⁴⁵ If the defendant chose to depose, but not to implead, a potentially liable third party, the defendant's right to use that deposition would be significantly more limited.

c. Increased likelihood of settlement

If the defendant impleads and exposes a culpable party to potential liability, he likely could negotiate a more favorable settlement. After all, by joining a party as an additional defendant, the original defendant likely would decrease the amount the plaintiff would accept from him alone in a settlement. The defendant's proportionate share of any overall settlement would diminish correspondingly. By increasing the number of parties who might contribute to a settlement, the defendant could increase the likelihood of amicable resolution.

d. Intangible benefits

Perhaps the most significant benefit of tendered-defendant impleader inuring to the defendant is intangible. If the plaintiff is particularly sympathetic or the defendant appears to have deep pockets, a jury may be psychologically reluctant to embrace the defendant's "he-did-it" defense. After all, to do so would send the plaintiff away from the courthouse with nothing. Rather than use that defense, the defendant would be better off creating a strategic piñata by tendering to the plaintiff the potentially liable third party. The defendant then could point to that third party and accuse: "*He* did it, not I." This approach would offer the jury an alternative party to thrash for the sympathetic plaintiff's benefit.

These benefits potentially accruing to the defendant are of course contingent upon the tendered party remaining in the lawsuit. If the plaintiff chose not to sue the tendered third party in his original lawsuit, and if the plaintiff still refused to proceed against that party after the direct tender,⁴⁶ arguably the tendered third party could move to dismiss the unpursued tendered claim.⁴⁷ Because of this potential situation, rule 14 could either allow the defendant to oppose any dispositive motion on behalf of the plaintiff or require that the court and the remaining litigants treat the dismissed third party as a de facto party to the litigation.⁴⁸

45. *Id.* 32(a)(2). It is likely that the defendant and the third-party defendant would be "adverse" within the meaning of rule 32(a)(2) even though the defendant cannot recover directly from the third-party defendant.

46. For a discussion of this issue, see *infra* note 53 and accompanying text.

47. The third party could file either a rule 12(b) motion to dismiss, a rule 56 motion for summary judgment, or a rule 41(b) motion to dismiss for failure to prosecute. If the plaintiff did not oppose such a motion, the court likely would grant it unless the court permitted the defendant to submit opposition on behalf of the reluctant plaintiff.

48. Presumably, it is in the public interest for courts to protect a defendant's ability to employ

2. When the Plaintiff Fails to Sue a Potentially Liable Third Party

Even if there is an incentive for the defendant to implead a third party on a nonderivative theory of liability, there is another practical prerequisite to the meaningful application of tendered-defendant practice—namely, that the plaintiff has not already sued the potential third-party defendant directly on the tendered claim. If the plaintiff has sued a potential third party directly for the tendered claim, tendering would be inconsequential and irrelevant.⁴⁹

Although many factors may discourage a plaintiff from directly suing a potentially liable party, the following three are most apparent: (1) the plaintiff is unaware of the potentially liable party and thus has not considered bringing suit; (2) the plaintiff knows about the party, has considered bringing suit, but has chosen not to; and (3) the plaintiff would like to sue the potentially liable party, but cannot do so for some technical reason such as the lack of personal jurisdiction or subject-matter jurisdiction.

a. Plaintiff is unaware of a potentially liable party

If the plaintiff has not sued a potential party because she is unaware that the party may be liable, tendered-defendant practice superficially appears to be useful; the defendant could implead the third party and tender that party directly to the unknowing plaintiff. From a practical standpoint, however, this procedure seems unnecessary. If ignorance is the only reason the plaintiff has failed to sue a third party, the problem could be solved simply through education. After learning about the potential defendant, the plaintiff in most cases could amend her complaint under rule 15 to add the third party as a defendant.⁵⁰

There may be some situations, however, in which a plaintiff could not amend her complaint, thus apparently making direct tender a meaningful option. For example, the court in its discretion might decline to grant the plain-

tendered-defendant practice meaningfully. Protecting the defendant's interests would not only be equitable, but it would also preserve the incentive for defendants to invoke this judicially economical practice.

49. Besides, rule 13(g)—not rule 14—governs satellite claims among codefendants. Rule 13(g) provides as follows:

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

FED. R. CIV. P. 13(g).

If the plaintiff has sued a defendant on one claim but *not* on the tendered claim, however, tendering a codefendant could be useful. For example, if the plaintiff has sued defendants *A* and *B* on claim *X*, but has sued *only* defendant *A* on claim *Y*, it might be useful for defendant *A* to tender defendant *B* to the plaintiff on claim *Y*. For this reason, if rule 14 is amended to include a tendered-defendant provision in civil cases, then rule 13(g) should likewise be amended to include a tendered codefendant provision.

Even if rule 14 is *not* so amended, it would seem sensible for rule 13(g) to include a tendered codefendant provision for admiralty cases. But this would be duplicative; rule 14(c) does not have rule 14(a)'s "a person *not* a party" limitation. FED. R. CIV. P. 14(a) (emphasis added). Thus, admiralty defendants already can tender codefendants under rule 14(c). See *supra* note 25.

50. See FED. R. CIV. P. 15(a) (governing amended and supplemental pleadings).

tiff's motion to amend to add the new defendant; the defendant's option to tender a third party directly to the plaintiff, however, presumably would be a matter of right.⁵¹ Also, a statute of limitations conceivably could bar the plaintiff's claim against the third party by the time the plaintiff learns of the claim. If so, it is possible, albeit doubtful, that the defendant's right to tender the third party directly to the plaintiff would not be time barred.⁵²

b. Plaintiff has chosen not to sue a potentially liable party

Although plaintiffs often sue everyone imaginable, it is not uncommon for a plaintiff to decline to proceed against a potentially liable party. For example, a plaintiff may choose not to sue someone in order to preserve an otherwise lucrative or amicable relationship, or to try to protect someone for whom the plaintiff otherwise feels sympathy. Tendered-defendant impleader allows the sacrificial defendant to implead the plaintiff's "friend" and then tender him to the reluctant plaintiff. This practice would subject the third-party "friend" to the same potential liability as the original defendant.⁵³

c. Plaintiff cannot sue the third party

The final situation in which tendered-defendant impleader may be significant is when the plaintiff initially cannot sue the third party because of a lack of personal or subject-matter jurisdiction.

(1) *Lack of personal jurisdiction*⁵⁴

Through rule 14(c)'s tendered-defendant provision, one court has permitted

51. But if the jurisdictional basis for the tendered claim is supplemental (and if tendered claims can still qualify for supplemental jurisdiction after *Finley v. United States*, 109 S. Ct. 2003 (1989), see *infra* notes 98-103 & 180-201 and accompanying text), the court always could exercise its discretion not to accept supplemental jurisdiction over the tendered claim. See, e.g., *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614, 618-19 (1988) (discussing discretionary element of supplemental jurisdiction); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("pendent jurisdiction is a doctrine of discretion, not of plaintiff's right"); see also *Binder v. Southeastern Historic Restoration, Inc.*, 711 F. Supp. 620, 624 (N.D. Ga. 1988) (court exercised discretion to decline exercise of supplemental jurisdiction over pendent party); *Mahoney v. National Org. for Women*, 681 F. Supp. 129, 136 (D. Conn. 1987) (court noted that supplemental jurisdiction "is a doctrine of judicial discretion, not of plaintiff's right"). If the jurisdictional basis is independent, however, the court then would be required, absent some other ground for dismissal, to hear the tendered claim. Cf. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given [to] them").

52. See *supra* note 7. The defendant's right to tender a third party to the plaintiff, despite the fact that the plaintiff's resulting claim otherwise would be time barred, may be more compelling if the plaintiff filed suit against the original defendant before the statute of limitations expired. Then, the tendered third-party claim arguably "relates back" to the date of filing. See *FED. R. CIV. P.* 15(c). While this proposition is unsettled, it is doubtful. See *supra* note 7.

53. If the plaintiff refuses to pursue her "friend" even after the defendant's tender, at the very least *res judicata* should bar the plaintiff's right subsequently to prosecute the tendered claim. See *infra* notes 86-87 and accompanying text.

54. While this Article characterizes the present issue as one of "lack of personal jurisdiction," a more accurate characterization would be "inability to serve process." The United States presumably has personal jurisdiction over all persons within its territorial boundaries. Cf. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 722 (1877) (every sovereign possesses "sovereignty over persons . . . within its territory"), *overruled in part*, *Shaffer v. Heitner*, 433 U.S. 186 (1976). Only rule 4 of the Federal

a plaintiff to recover damages from a third party over whom the court could not otherwise exercise personal jurisdiction. In that case, *Spearing v. Manhattan Oil Transportation Corp.*,⁵⁵ the plaintiff sued Hudson Tank Storage Company (Hudson) as an original defendant. Although Hudson was "not amenable to the court's personal jurisdiction" as an originally-named defendant,⁵⁶ it was subject to the court's personal jurisdiction "in its capacity as a named third-party defendant."⁵⁷ On this basis, the court allowed the plaintiff to proceed to judgment against Hudson.⁵⁸ Justifying this disposition, the court stated:

Under Rule 4(f) process is effective to give the court personal jurisdiction over a purported third-party defendant served within 100 miles of the court house but outside the forum state's boundaries if such third-party defendant was one over whom the "bulge" state has chosen to exercise personal jurisdiction.⁵⁹

Although for all practical purposes Hudson was a true defendant as a result of the direct tender, it was technically a third-party defendant for the purpose of personal jurisdiction.⁶⁰ This scenario could recur, albeit infrequently, in any civil case brought in federal court.

(2) Lack of subject-matter jurisdiction

In some instances, a plaintiff is unable to sue a potentially liable third party in federal court because of the lack of subject-matter jurisdiction. Tendered-defendant practice might provide a means to overcome this jurisdictional impediment. For example, such a situation could arise when the plaintiff's claim against the potentially liable third party is grounded solely in state law and complete diversity does not exist. A tendered-defendant impleader provision might allow the defendant to join that third party, assert supplemental jurisdiction over the claim, and then tender the party to the plaintiff for judgment.⁶¹

Were tendered-defendant practice to be used in this manner, however, it would raise serious jurisdictional questions unrelated to the rules of practice.⁶²

Rules of Civil Procedure limits the exercise of this sovereign power by procedurally restricting the scope of service of process. See FED. R. CIV. P. 4. See generally 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063, at 225 (1987) ("The primary function of rule 4 is to provide the mechanism for bringing notice of the commencement of an action to defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.").

55. 375 F. Supp. 764 (S.D.N.Y. 1974).

56. *Id.* at 771.

57. *Id.*

58. *Id.*

59. *Id.* (footnote omitted).

60. See also *Spearing v. Manhattan Oil Transp. Corp.*, 317 F. Supp. 829, 831 n.* (S.D.N.Y. 1970) (service of third-party summons and complaint within 100 miles of the United States Court-house in the Southern District of New York valid pursuant to Rule 4(f)).

61. This is a jurisdictional beehive. For a discussion of the impropriety of this approach, see *infra* notes 123-201 and accompanying text.

62. "Practice" considerations would be significant in this situation if Congress or the courts were to make the standard for applying supplemental jurisdiction to tendered claims coextensive with the procedural standard for invoking the practice. Then, a judicial determination that the Federal Rules permit a tendered claim would be a *de facto* determination that federal jurisdiction supports it. Cf. FED. R. CIV. P. 13(a) (a determination that a counterclaim is "compulsory" is a *de facto* determination that federal ancillary jurisdiction supports it). Such a jurisdictional/procedural

If there is no basis for federal jurisdiction over a tendered claim, it is irrelevant whether a tendered-defendant provision would sanction it procedurally.⁶³ After all, a mere rule of procedure cannot create subject matter jurisdiction.⁶⁴ Part III of this Article addresses this and other jurisdictional issues in greater detail.⁶⁵

B. Policy Benefits of Tendered-Defendant Impleader

When tendered-defendant practice is meaningfully applicable, its use substantially furthers several policy objectives underlying the Federal Rules of Civil Procedure. First, all of the joinder provisions of the Federal Rules, including those governing cross-claims, counterclaims, third-party claims, claim joinder, and party joinder,⁶⁶ were designed to "enable the disposition of a whole controversy . . . at one time and in one action."⁶⁷ Liberal joinder helps to eliminate circuity of action,⁶⁸ multiple litigation,⁶⁹ and occasional inconsistent judgments by providing a single federal forum in which courts can dispose of multiple claims against multiple parties in a single civil action.⁷⁰ The United States Supreme Court has summed up these purposes succinctly: "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."⁷¹ Tendered-defendant third-party practice clearly furthers these goals.

framework would obviously be sensible, efficient, and would more consistently implement important congressional goals. Considering the Supreme Court's opinion in *Finley v. United States*, 109 S. Ct. 2003 (1989), any impetus for such a change would have to come from Congress—not from the Supreme Court or the lower federal courts.

63. Whether tendered claims fall within the federal courts' supplemental jurisdiction is uncertain after *Finley*, 109 S. Ct. at 2003. Arguably they should. See *infra* notes 123-201 and accompanying text.

64. See, e.g., FED. R. CIV. P. 82 ("Th[e] [Federal] [R]ules shall not be construed to extend or limit the jurisdiction of the United States district courts . . ."); see also *Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S. Ct. 2218, 2227 (1989) (Kennedy, J., dissenting) (citing rule 82).

65. See *infra* notes 91-206 and accompanying text.

66. See FED. R. CIV. P. 13(g) (cross-claims); *id.* 13(a) & (b) (counterclaims); *id.* 14 (third party claims); *id.* 18 (claim joinder); *id.* 20 (party joinder).

67. *United States v. American Sur. Co.*, 25 F. Supp. 700, 701 (S.D.N.Y. 1938).

68. See, e.g., *CCMS Publishing Co. v. Dooley-Maloof, Inc.*, 645 F.2d 33, 38 (10th Cir. 1981) (rule 13); *Laffey v. Northwest Airlines*, 567 F.2d 429, 477 (D.C. Cir. 1976) (rule 14), *cert. denied*, 434 U.S. 1086 (1978); *Colton v. Swain*, 527 F.2d 296, 299 (7th Cir. 1975) (rule 14); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 439 n.6 (3d Cir. 1971) (rule 14), *cert. denied*, 405 U.S. 1017 (1972); *LASA Per L'Industria del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 146 (6th Cir. 1969) (rules 13 & 14); *Noland Co. v. Graver Tank & Mfg. Co.*, 301 F.2d 43, 50 (4th Cir. 1962) (rule 14); *Dery v. Wyer*, 265 F.2d 804, 806-07 (2d Cir. 1959) (rule 14); *American Export Lines v. Revel*, 262 F.2d 122, 124 (4th Cir. 1958) (rule 14); *United States v. Merchants Matrix Cut Syndicate*, 219 F.2d 90, 95 (7th Cir. 1955) (rule 13); *United States v. Acord*, 209 F.2d 709, 712 (10th Cir. 1954) (rule 14); *Waylander-Peterson Co. v. Great N. Ry.*, 201 F.2d 408, 415 (8th Cir. 1953) (rule 14); *Blair v. Cleveland Twist Drill Co.*, 197 F.2d 842, 845 (7th Cir. 1952) (rules 13 & 14); *Baltimore & Ohio R.R. v. Saunders*, 159 F.2d 481, 484 (4th Cir. 1947) (rule 14).

69. *Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257, 1261 (7th Cir. 1977) (rule 13); *Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d 620, 625 (D.C. Cir. 1975) (rule 13); *Merchants Matrix Cut Syndicate*, 219 F.2d at 95 (rule 13).

70. E.g., *United States v. Yellow Cab Co.*, 340 U.S. 543, 556 (1951) (joinder rules "intended to facilitate . . . the trial of multiple claims which otherwise would be triable only in separate proceedings") (rule 14).

71. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).

Second, an important purpose of the Federal Rules is to encourage settlement; by providing for liberal joinder and discovery, the Rules "enable the . . . sides to agree on the facts and issues, settle more cases, and reduce the number of issues and length of trials."⁷² Because universal tendered-defendant impleader would permit joinder of all potentially culpable parties, it can diminish each defendant's proportionate share of any gross settlement acceptable to the plaintiff. Furthermore, by joining all of the relevant actors for discovery, pre-trial motion practice, and settlement negotiations, all parties could better assess their potential exposure or recovery. These factors could increase substantially the likelihood of settlement.

Finally, a civil tendered-defendant provision would help to eliminate the potential for abuse of the Rules' current indemnity impleader provision.⁷³ The current Rules do not permit a civil defendant to implead a putative solely liable third party. Thus, a defendant who wishes to do so must implead such a party for contribution as an alleged *joint* tortfeasor,⁷⁴ and then at trial argue that the third party is solely liable. If the factfinder agrees, the ruse is successful: the defendant is exonerated and the plaintiff recovers nothing from him (or from the third party defendant). A tendered-defendant impleader rule would remove any need to resort such an artifice.

Thus, while tendered-defendant impleader furthers the litigation interests of plaintiffs and defendants (at the expense of tendered defendants), it has more important consequences. It encourages the compromise and settlement of litigation, it promotes efficient judicial dispute resolution when settlement is impossible, and it eliminates the incentive to distort the Federal Rules.

III. POTENTIAL DRAWBACKS OF EMPLOYING TENDERED-DEFENDANT PRACTICE

Although tendered-defendant practice furthers important policy objectives of the Federal Rules, its unavailability in civil actions is largely due to purported problems associated with its application. The two problems most often perceived to exist are: (1) that tendered-defendant provisions are inconsequential because they cannot force plaintiffs to proceed unwillingly against tendered parties, and (2) that tendered-defendant claims often lack federal subject-matter jurisdiction. This Part addresses these perceptions, evaluates whether they are well founded, and considers whether they justify restricting tendered-defendant practice exclusively to maritime cases.

A. The Reluctant Plaintiff Problem: Compelling the Plaintiff to Pursue a Tendered Third Party

When tendered-defendant impleader was available in all civil actions, courts generally held that "the plaintiff [did not need to] amend his complaint to

72. W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 234 (1968).

73. See FED. R. CIV. P. 14(a).

74. See *supra* notes 2 & 36 and accompanying text.

state a claim against [a] third party if he [did] not wish to do so."⁷⁵ As a result, the tendered-defendant provision of rule 14 apparently seemed toothless to courts⁷⁶ and commentators.⁷⁷ Indeed, the Federal Rules Advisory Committee felt that this problem rendered pre-1946 tendered defendant practice inconsequential: "[tendered-defendant] impleader . . . amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is time-consuming futility."⁷⁸ Partly because of this perception, the Advisory Committee recommended the 1946 amendment that eliminated tendered-defendant impleader in civil actions. Presumably, this perception is to some extent responsible for the continued unavailability of the practice in nonadmiralty actions.

It is undoubtedly true that a court cannot compel a plaintiff to prosecute a claim that she does not wish to pursue. Nevertheless, this cannot justify the universal unavailability of tendered-defendant practice in nonadmiralty cases. In the first place, this issue arises only if a plaintiff actually chooses not to pursue a tendered defendant.⁷⁹ Surely, when a plaintiff does want (or at least is willing) to proceed against a tendered third party, the Rules should not preclude her from doing so. At most, this argument suggests that in some instances tendering may be futile. But, it does not justify the general unavailability of the practice in civil actions.⁸⁰

More significantly, however, this argument is simply wrong. In a legal sense, courts *can* compel reluctant plaintiffs to pursue tendered claims against third parties or else suffer adverse consequences. Present rule 14(c) states that once a defendant tenders a third party to the plaintiff, "the action *shall* proceed as if the plaintiff had commenced it against the third-party defendant."⁸¹ This rule is mandatory; because the action "shall" proceed as if the plaintiff commenced it against the tendered party, the plaintiff *must* pursue that party in the same manner as she would pursue any other defendant. And although rule 14(c) does not expressly provide for sanctions against a noncomplying plaintiff,

75. FED. R. CIV. P. 14 advisory committee's note to the 1946 amendment (citing *Carbola Chem. Co. v. Trundle*, 3 F.R.D. 502 (S.D.N.Y. 1943); *Connelly v. Bender*, 36 F. Supp. 368 (E.D. Mich. 1941); *Whitmire v. Partin*, 2 F.R.D. 83 (E.D. Tenn. 1941); *Satink v. Holland Township*, 31 F. Supp. 229 (D.N.J. 1940); *Crim v. Lumbermens Mut. Casualty Co.*, 26 F. Supp. 715 (D.D.C. 1939)).

76. See, e.g., *Delano v. Ives*, 40 F. Supp. 672, 673 (E.D. Pa. 1941) ("the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff").

77. FED. R. CIV. P. 14 advisory committee's note to 1946 amendment.

78. *Id.*

79. This problem is unlikely to arise often. Tendered-defendant practice has long existed in maritime cases, see ADMIRALTY RULE 56 (repealed 1966); FED. R. CIV. P. 14(c) (1966 amendment retaining tendered-defendant practice in admiralty cases), and the "reluctant plaintiff" problem has not overwhelmed admiralty courts. In all of the reported rule 14(c) tendering cases, no plaintiff has declined to pursue a tendered third party. For reasons why a plaintiff might choose to forgo pursuing a tendered third party, see *supra* notes 50-65 and accompanying text.

80. Moreover, this problem does not seem any more compelling in the civil context than in the admiralty context. Thus, it cannot justify the markedly different approaches to tendered-defendant impleader of current rules 14(a) and 14(c). See FED. R. CIV. P. 14(a) (nonadmiralty third-party practice); *id.* 14(c) (admiralty third-party practice). Furthermore, rule 13 allows permissive counterclaims even though some hypothetical defendants might decline to employ the available procedure. See *id.* 13(b).

81. *Id.* 14(c) (emphasis added).

an implied sanction exists that is similar to the implied sanction under rule 13(a).

Rule 13(a) provides that a defendant "shall state as a counterclaim any claim . . . aris[ing] out of the transaction or occurrence that is the subject matter of the [plaintiff's] claim."⁸² A defendant who fails to plead a compulsory counterclaim is precluded from asserting it in a subsequent action.⁸³ This proposition is well settled even though rule 13 does not expressly mention preclusion.⁸⁴ After all, a penalty for noncompliance is essential to further rule 13(a)'s goal of promoting judicial economy;⁸⁵ otherwise, the "compulsory" aspect of a "compulsory counterclaim" would be meaningless. A similar penalty presumably exists in the tendered-defendant context; otherwise, rule 14(c)'s mandatory language, which is also intended to promote judicial economy, would be meaningless.⁸⁶ Thus, a plaintiff who refuses to pursue a tendered third party should be precluded from doing so in a subsequent action.⁸⁷ Such a penalty would

82. *Id.* 13(a) (emphasis added).

83. Although it is clear that the defendant cannot later pursue an unasserted compulsory counterclaim, the doctrinal basis underlying this bar remains unsettled. See *Dindo v. Whitney*, 451 F.2d 1, 3 (1st Cir. 1971). Some courts suggest that the defendant's subsequent action is precluded by the doctrines of res judicata, merger, and bar. *E.g.*, *Dragor Shipping Corp. v. Union Tank Car Co.*, 378 F.2d 241, 244 (9th Cir. 1967); *Local Union No. 11 Bhd. of Elec. Workers v. G.P. Thompson Elec., Inc.*, 363 F.2d 181, 184 (9th Cir. 1966); *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961); *Union Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960); *United States v. Eastport S.S. Corp.*, 255 F.2d 795, 805 (2d Cir. 1958); *Switzer Bros., Inc. v. Locklin*, 207 F.2d 483, 488 (7th Cir. 1953); see *Scott, Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 26-27 (1942); *Developments in the Law, Res Judicata*, 65 HARV. L. REV. 818, 832 (1952). See generally 6 WRIGHT & MILLER, *supra* note 2, § 1417, at 95 (1971) (discussing alternative theories that support barring a later action for failure to plead a compulsory counterclaim); FEDERAL PROCEDURE LAWYERS' EDITION § 62:215, at 361 (1984) (listing the various characterizations of the bar arising under rule 13(a)). Other courts, however, have prevented subsequent actions under the theories of waiver or estoppel. *E.g.*, *Martino v. McDonald's Sys., Inc.*, 598 F.2d 1079, 1083 (7th Cir. 1979); *Cleckner v. Republic Van & Storage Co.*, 556 F.2d 766, 769 (5th Cir. 1977); *Dindo*, 451 F.2d at 3; see *Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 MINN. L. REV. 423, 428-36 (1954); Note, *The Erie Doctrine and Federal Rule 13(a)*, 46 MINN. L. REV. 913, 920-21 (1962). But cf. *Howell, Counterclaims and Cross-Complaints in California*, 10 S. CAL. L. REV. 415, 454-58 (1937) (discussing courts' more strict application of waiver to counterclaims than to joinder and impleader). See generally 6 WRIGHT & MILLER, *supra* note 2, § 1417, at 96 (same); FEDERAL PROCEDURE LAWYERS' EDITION § 62:215, at 361 (1984) (same).

Although the issue remains unsettled, "the trend of decisions concerning preclusion appears to be moving from reliance upon strict res judicata theory to factual waiver or estoppel theory." Kennedy, *Counterclaims Under Federal Rule 13*, 11 HOUS. L. REV. 255, 260 (1974). Most commentators have looked favorably upon this trend. See *id.*; 6 WRIGHT & MILLER, *supra* note 2, § 1417, at 96-97.

84. See *Cleckner*, 556 F.2d at 769 n.3 (discussing the absence of an express rule 13(a) penalty for failure to bring a compulsory counterclaim). Although the preliminary draft of the counterclaim rule expressly called for preclusion, the Advisory Committee deleted this provision from subsequent drafts. See FED. R. CIV. P. 18 (preliminary draft of May 1936) ("If the action proceeds to judgment without such claim being set up, the claim shall be barred."). Nevertheless, the Committee's notes to the final draft of rule 13 included this deleted language. See FED. R. CIV. P. 13 advisory committee's note ("If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred.").

85. For an overview of the policy underlying rule 13(a), see FEDERAL PROCEDURE LAWYERS' EDITION § 62:206 (1984).

86. For a discussion of the policies underlying tendered-defendant practice, see *supra* notes 66-74 and accompanying text.

87. It is unclear whether the doctrine of res judicata or the doctrine of estoppel or waiver would underlie this preclusion; no courts have addressed the issue in the context of present rule 14(c). Although estoppel is becoming the preferred preclusion doctrine in the context of unasserted rule

promote judicial economy by preventing multiple lawsuits arising out of related events. With such a penalty, courts could resolve tendered claims definitively regardless of the plaintiff's chosen course of action.

Notwithstanding the finality that would be engendered by a preclusion penalty, the plaintiff's failure to pursue a tendered third party could effectively deny the *defendant* the benefits that led him to utilize direct-tender practice in the first place.⁸⁸ Considering this, defendants might generally be discouraged from tendering third parties at all. The Rules could, however, reduce this disincentive. For example, if a court were to dismiss a tendered defendant because of the plaintiff's failure to prosecute, the Rules could permit the original defendant to employ the rules of discovery and evidence as if the tendered defendant were still a party to the suit. Alternatively, the Rules could permit the defendant to step in and pursue the plaintiff's tendered claim on the plaintiff's behalf. The defendant (as surrogate plaintiff) then formally could oppose any dispositive motions filed by the third party, whether such motions were based on a failure to prosecute or on any other ground.⁸⁹ Such provisions largely would preserve and maximize the defendant's incentive to utilize tendered-defendant practice.

For these reasons, the Advisory Committee's draconian approach (eliminating civil tendered-defendant practice altogether) to this minor problem was unjustified; because plaintiffs rarely decline to proceed against tendered third parties, and because the Rules imply adequate remedies that compel compliance and preserve the benefits of the practice, tendered-defendant impleader is rarely, if ever, a "time-consuming" exercise in "futility."⁹⁰ Thus, the "reluctant plaintiff" issue should not stand in the way of resurrecting tendered-defendant impleader in all civil actions.

B. *Subject-Matter Jurisdiction Over Tendered-Defendant Claims*

Third-party claims, like all actions brought in federal court, must fall

13(a) counterclaims, *see supra* note 83, the more compelling doctrine of res judicata arguably should apply to unasserted tendered claims.

Estoppel is preferred in the counterclaim context partly out of mercy for unwilling defendants whom the plaintiff has hailed into court. Estoppel can "extricat[e] . . . defendant[s] who ha[ve] . . . [un]knowingly refrained from asserting [a] [counter]claim." 6 WRIGHT & MILLER, *supra* note 2, § 1417, at 96-97. Moreover, estoppel is a "more flexible tool" to protect such defendants from the harsh effects res judicata would have in the cases of default judgment, consent judgment, or dismissals after settlement. *Id.* at 97.

However, there are no reasons why the Rules should afford a *plaintiff* such quarter. It is the plaintiff who initiates litigation. And if the plaintiff fails to play by the rules of tendered-defendant practice, it is the plaintiff who should suffer the consequences of res judicata. Therefore, when a plaintiff declines to pursue a tendered claim, res judicata should merge her unasserted claim into any final judgment, thus forever barring her from suing the previously-tendered third party on the tendered claim.

88. *See supra* notes 37-48.

89. The defendant (as surrogate plaintiff) ultimately could proceed against the third party at trial and then, if successful, recover costs incurred (including a reasonable attorney's fee) in putting on the plaintiff's case for her. Alternatively, if the defendant pursues the tendered party in order to preserve the benefits of tendering, the Rules could prevent the plaintiff from recovering any judgment that the court might enter against the third party in favor of the plaintiff.

90. FED. R. CIV. P. 14 advisory committee's note to 1946 amendment.

within the court's subject-matter jurisdiction.⁹¹ Because rule 14 cannot provide subject-matter jurisdiction,⁹² an independent or supplemental basis of jurisdiction must exist before any third-party claim (indemnity or tendered-defendant) is cognizable in federal court. In recommending the abolition of civil tendered-defendant impleader in 1946, the Advisory Committee sought to eliminate problems arising from this "jurisdictional limitation."⁹³ This is presumably the second major reason why tendered-defendant practice remains unavailable in nonadmiralty civil actions.

1. Jurisdictional Analysis of Tendered-Defendant Claims

Traditionally, indemnity third-party claims have not required an exacting jurisdictional analysis.⁹⁴ Defendants in the vast majority of cases theoretically could base federal jurisdiction over an indemnity claim on diversity,⁹⁵ federal question,⁹⁶ admiralty,⁹⁷ or any other independent basis of federal jurisdiction.

91. See, e.g., *Mollett v. Penrod Drilling Co.*, 872 F.2d 1221, 1227 (5th Cir. 1989) (court labors to find subject matter jurisdiction over third-party claim); *Spearing v. Manhattan Oil Transp. Corp.*, 317 F. Supp. 829, 831 (S.D.N.Y. 1970) (tendered-defendant third-party claims must be supported by federal jurisdiction); 6 WRIGHT & MILLER, *supra* note 2, § 1444, at 215.

92. See, e.g., *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 886 (3d Cir. 1977) ("Subject matter jurisdiction cannot be expanded by the Federal Rules"); see also *Dery v. Wyer*, 265 F.2d 804, 808 (2d Cir. 1959) ("But Rule 14 does not extend jurisdiction. It merely sanctions an impleader procedure . . ."); FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."). See generally 6 WRIGHT & MILLER, *supra* note 2, § 1444, at 217-18 (discussing basis of ancillary jurisdiction).

93. See FED. R. CIV. P. 14 advisory committee's note to the 1946 amendment. The Committee stated:

[I]n any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. . . . For th[is] reason therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment

Id.

94. This is true for both rule 14(a) and rule 14(c) indemnity claims. There are no practical or jurisdictional differences between an indemnity claim brought under rule 14(a), and an indemnity claim brought under rule 14(c). See *supra* notes 4 & 24 and accompanying text. Under either rule, the original defendant impleads the third party alleging that the third party should be liable to the original defendant if the court finds the original defendant liable to the original plaintiff. The relationship between the parties, and the nature of the actions are identical. But see *McCann v. Falgout Boat Co.*, 44 F.R.D. 34 (S.D. Tex. 1968). The *McCann* court erroneously treated rule 14(c) and rule 14(a) indemnity claims differently for jurisdictional purposes, refusing to apply ancillary jurisdiction to defendant's rule 14(c) third-party claim when, under then-existing supplemental jurisdiction doctrine, ancillary jurisdiction would have applied to an identical rule 14(a) indemnity claim.

95. See 28 U.S.C. § 1332 (1982); *Mollett*, 872 F.2d at 1227; *Oroco Marine, Inc. v. National Marine Serv.*, 71 F.R.D. 220, 223 (S.D. Tex. 1976).

96. 28 U.S.C. § 1331 (1982); see *In re Sedco, Inc.*, 543 F. Supp. 561, 570 (S.D. Tex. 1982) (court had subject-matter jurisdiction over rule 14(c) indemnity claim "arising under the laws of the United States").

97. 28 U.S.C. § 1333 (1982). Section 1333 provides as follows:

The district courts shall have original jurisdiction, exclusive of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

Id. Numerous courts have found admiralty jurisdiction over third-party indemnity claims. See

Nevertheless, such independent bases of federal jurisdiction never have been necessary. Prior to the Supreme Court's opinion in *Finley v. United States*,⁹⁸ once courts determined that an indemnity claim arose out of the same common nucleus of operative facts as the anchor claim and was logically related to that claim,⁹⁹ ancillary federal jurisdiction attached. Because indemnity third-party claims necessarily arise out of the "same transaction or occurrence" as the anchor claim,¹⁰⁰ this two-pronged test was "always" satisfied when joinder was procedurally proper.¹⁰¹ While *Finley* renders this conclusion less certain,¹⁰² it

Parker v. Gulf City Fisheries, Inc., 803 F.2d 828, 829-30 (5th Cir. 1986); Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968, 987 (5th Cir. 1978); Watz v. Zapata Off-Shore Co., 431 F.2d 100, 118 (5th Cir. 1970); Tri-State Oil Tool Indus. v. Delta Marine Drilling Co., 410 F.2d 178, 186 (5th Cir. 1969); *Sedco*, 543 F. Supp. at 570; Tatlow & Pledger (PTY) Ltd. v. Hermann Forwarding Co., 456 F. Supp. 351, 353 (S.D.N.Y. 1978); Cante y. Flensburger Dampfercompagnie Harald Schultdt & Co., 55 F.R.D. 127, 128-29 (E.D.N.C. 1971).

98. 109 S. Ct. 2003 (1989).

99. *E.g.*, Moore v. New York Cotton Exch., 270 U.S. 593, 609-10 (1926); Revere Copper & Brass, Inc. v. Aetna Casualty & Sur. Co., 426 F.2d 709, 714 (5th Cir. 1970); Northern Contracting Co. v. C.J. Langenfelder & Son, Inc., 439 F. Supp. 621, 623-24 (E.D. Pa. 1977).

100. See FED. R. CIV. P. 14(a); *id.* 14(c) (indemnity impleader provision containing "same transaction [or] occurrence" standard as rule 14(a) and, in addition, a more liberal "series of transactions or occurrences" provision).

101. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978) (indemnity claim asserted by defendant against a third party "always is" ancillary); see also Field v. Volkswagenwerk AG, 626 F.2d 293, 298-99 (3d Cir. 1980) (indemnity or contribution claim by defendant against third-party defendant is within ancillary jurisdiction of federal courts); Rogers v. Aetna Casualty & Sur. Co., 601 F.2d 840, 843 n.4 (5th Cir. 1979) (federal court may assert jurisdiction over subrogation claims by defendant against nondiverse impleaded third-party defendant); May's Family Centers, Inc. v. Goodman's, Inc., 104 F.R.D. 112, 113-16 (N.D. Ill. 1985) (indemnity claim is ancillary because of common factual basis with, and logical dependence on, original complaint); Ahern v. Gaussoin, 104 F.R.D. 37, 40-41 (D. Or. 1984) (contribution claim is ancillary where impleader is proper); Kotsonis v. Superior Motor Express, 539 F. Supp. 642, 646 (M.D.N.C. 1982) (third-party complaint seeking indemnity or contribution is ancillary to principal action); Curtis v. Radiation Dynamics, Inc., 515 F. Supp. 1176, 1178-79 (D. Md. 1981) (ancillary jurisdiction present because third party action dependent on original action for its disposition); Nynaes Petroleum AB v. Transworld Oil, Ltd., 1981 A.M.C. 675, 677 (S.D.N.Y. 1980) (ancillary jurisdiction justified by "same core of facts" underlying the admiralty claim and the third-party claims for indemnity and lost profits); Tatlow & Pledger (PTY), Ltd. v. Hermann Forwarding Co., 456 F. Supp. 351, 353 (S.D.N.Y. 1978) (claim for indemnity or contribution within court's ancillary jurisdiction); Northern Contracting Co. v. C.J. Langenfelder & Son, Inc., 439 F. Supp. 621, 624 (E.D. Pa. 1977) (third-party complaint claiming indemnity or contribution is ancillary to main action); *In re Albert & Maguire Secs. Co.*, 70 F.R.D. 361, 363 (E.D. Pa. 1976) (third-party complaint for indemnity or contribution does not require independent basis of jurisdiction). But see Hartford Accident & Indem. Co. v. Sullivan, 846 F.2d 377, 382 (7th Cir. 1988) (Posner, J.) (majority rejects proposition that "any 14(a) claim is within the ancillary jurisdiction of the federal courts").

102. Under *Finley*'s restrictive approach to supplemental jurisdiction, indemnity third-party claims may no longer be permissible unless supported by an independent basis of federal subject-matter jurisdiction. Said the *Finley* majority, "with respect to the addition of parties, as opposed to the addition of only claims" the Court will "not assume that the full constitutional power has been congressionally authorized." *Finley*, 109 S. Ct. at 2007. Thus, the Court will not extend supplemental jurisdiction to claims against "addition[all] . . . parties" unless a specific statute authorizes it. *Id.*

Although no statute specifically extends ancillary jurisdiction to cover indemnity claims against additional parties, surely the *Finley* Court did not intend to disturb the well-settled rule that ancillary supplemental jurisdiction covers indemnity claims. Nevertheless, the Court failed to include this application of ancillary jurisdiction as one of the "narrow" exceptions to its new restrictive approach. See *id.* at 2008. Under the Court-recognized "ancillary" exception, supplemental jurisdiction is permissible despite the lack of statutory authorization only if the "ancillary" party has a claim "upon contested assets within the court's exclusive control," or if his presence is "necessary to give effect to the court's judgment." *Id.* Neither is the case in typical indemnity and contribution impleader. The justification for permitting factually related third-party claims is merely to "con-

likely remains true.¹⁰³ For this reason, a jurisdictional analysis of indemnity third-party claims for all practical purposes begins and ends with the joinder rule.

In contrast, tendered-defendant claims require a more thoughtful and deliberate jurisdictional analysis.¹⁰⁴ To understand why, one must take an elementary look at how courts approach and analyze subject-matter jurisdiction issues.

When determining whether subject-matter jurisdiction exists over a claim, federal courts scrutinize the claim of the party seeking to recover. In traditional indemnity impleader, the *defendant* seeks to recover from the third party. To this end, the defendant petitions the court for an order compelling the third party to pay *him*, because he has paid, or may be liable to pay, the plaintiff.¹⁰⁵ Thus, there is no question that an indemnity claim is the defendant's. Upon determining that the claim arises out of the same "nucleus of operative facts" as plaintiff's claim against that defendant,¹⁰⁶ courts have always found supporting ancillary jurisdiction.

Tendered-defendant claims, however, are fundamentally different and therefore compel a distinct analysis. Through tendering, the defendant does *not* seek to recover from the third party on the tendered claim.¹⁰⁷ Rather, the defendant petitions the court for an order compelling the third party to pay the *plaintiff* directly.¹⁰⁸ Here lies the analytical problem: it is unclear whose

venience . . . the litigants," and to further "judicial economy." *Id.* (quoting *Kroger*, 437 U.S. at 376-77). Considering this, the relationship between an indemnity claim and an anchor claim is arguably one of "mere factual similarity," which cannot "justify [the] extension of the doctrine of ancillary jurisdiction." *Id.* (quoting *Kroger*, 437 U.S. at 376-77).

For these reasons, the viability of ancillary jurisdiction over indemnity third-party claims is uncertain after *Finley*. Indeed, less than a month after the Court handed down *Finley*, one lower court eloquently presaged its possible effect on third-party practice: "Congress' silence on ancillary jurisdiction, and Justice Scalia's sweeping language in *Finley* arguably sound the death knell for ancillary jurisdiction in this context." *Community Coffee Co. v. M/S KRITI AMETHYST*, 715 F. Supp. 772, 773 (E.D. La. 1989) (Beer, J.). Noting that "ancillary jurisdiction may no longer cover Rule 14(a) indemnity and contribution claims," Judge Beer opined that third-party ancillary jurisdiction "may have been caught in the wide swath *Finley* cut into supplemental jurisdiction. While the *Finley* majority may well have intended to address specifically the pendent party jurisdiction problem, the opinion's sweeping language is undeniable. Thus, its effect on supplemental jurisdiction in general is potentially far-reaching." *Id.* at 774. *But see* *Huberman v. Duane Fellows, Inc.*, 725 F. Supp. 204 (S.D.N.Y. 1989) ("This court does not share the doubts of the *Community Coffee* court and does not read *Finley* as threatening jurisdiction over impleaded third-party defendants."); *Lingo v. Great Lakes Dredge & Dock Co.*, No. CV-85-2789 (E.D.N.Y. 1989) (WESTLAW, Allfeds database) ("*Finley* does not say that it has abolished all ancillary or pendent party jurisdiction . . .").

103. For a discussion of *Finley*, see *infra* notes 180-201 and accompanying text.

104. On this point, the critics of tendered-defendant practice are correct. For reasons explained later, however, hypothetical jurisdictional problems cannot justify the universal unavailability of the practice. See *infra* notes 202-06 and accompanying text.

105. See FED. R. CIV. P. 14(a) & (c) (indemnity impleader provision).

106. Of course, this analysis is purely academic. Courts reflexively permit indemnity impleader because ancillary jurisdiction almost always covers indemnity claims. See *Kroger*, 437 U.S. at 376. *But see* *Finley*, 109 S. Ct. at 2008 (Court failed to include indemnity claims among permissible ancillary claims); *Community Coffee Co.*, 714 F. Supp. at 774 (ancillary jurisdiction may not include Rule 14(a) indemnity and contribution claims); *supra* note 102 (uncertainty of exercising ancillary jurisdiction over third-party indemnity claims). Thus, courts rarely go through this pedestrian jurisdictional analysis. See *supra* notes 94-103 and accompanying text.

107. See *supra* notes 94-103 and accompanying text.

108. See FED. R. CIV. P. 14(c).

"claim" the federal court should scrutinize when determining whether subject-matter jurisdiction supports a tendered-defendant claim. Should the court consider the *defendant's* third-party "claim" against the impleaded party? Or, should the court consider the *plaintiff's* resulting "claim" against the tendered third-party defendant? Competing considerations cloud this issue.

On the one hand, the original defendant has no substantive "claim" against the third party whom he brings into the case. Because he has no right to recover from the third party, the defendant can demand only that the court render judgment in favor of the plaintiff. In this light, only the original plaintiff has a substantive right to recover from the third party, and arguably, only the plaintiff has a claim against the third-party defendant.

On the other hand, despite the plaintiff's possible "claim" against the third party, the plaintiff does not "assert" the claim against that third party—at least in the first instance. The plaintiff clearly does not "assert" any right of action. The original defendant asserts the plaintiff's right on the plaintiff's behalf.

Unfortunately, the courts in rule 14(c) tendering cases have yet to articulate clearly which claim is jurisdictionally significant. Furthermore, most courts have failed even to recognize that the issue exists. The vast majority simply have evaluated tendered-defendant impleader as if it were identical to indemnity impleader without discussion or analysis. These courts have blindly considered whether subject-matter jurisdiction exists vis-à-vis the *defendant* and the tendered third party, without even acknowledging an alternative analytical possibility.¹⁰⁹

Although this majority approach to tendered-defendant jurisdiction is convenient, it is somewhat illogical; in theory, courts more likely should evaluate jurisdiction vis-à-vis the plaintiff and the tendered third party. First, in the context of existing rule 14(c), the language itself provides that once the original defendant initiates a tendered-defendant claim, "the action shall proceed *as if the plaintiff had commenced it* against the third party defendant."¹¹⁰ Hence the rule postures the claim against the third party as if the *plaintiff* "had commenced it."¹¹¹ Indeed, the Federal Rules Advisory Committee in 1946 analogized the tendered-claim situation to that existing when the "plaintiff . . . amend[s] his complaint [to] assert a claim against the impleaded third party."¹¹²

Second, even though the plaintiff technically does not "assert" the tendered-defendant claim against the third party, the *plaintiff* alone possesses the substantive right to recover. The defendant has no such right. Thus, it is the

109. *E.g.*, *In re Motor Ship Pac. Carrier*, 489 F.2d 152, 154 (5th Cir. 1974) (court ponders whether jurisdiction exists, but does not distinguish tendered-defendant impleader from indemnity impleader); *Stinson v. S.S. Kenneth McKay*, 360 F. Supp. 674, 675 (S.D. Tex. 1973) (Noel, J.); *McCann v. Falgout Boat Co.*, 44 F.R.D. 34, 41-42 (S.D. Tex. 1968) (Noel, J.).

110. FED. R. CIV. P. 14(c) (emphasis added). Presumably, any general civil tendered-defendant provision adopted would have a similar provision.

111. *Id.*

112. FED. R. CIV. P. 14 advisory committee's note to the 1946 amendment. It is remarkable that so few admiralty courts have recognized this seemingly obvious point in the rule 14(c) context.

plaintiff—not the defendant—who is the “real party in interest.”¹¹³ And only a “real party in interest” can pursue a claim in federal court.¹¹⁴

For these reasons, the better jurisdictional analysis would be for courts to examine the jurisdictional grounds for the *plaintiff's* resulting claim against the tendered third party. In short, for jurisdictional purposes courts should treat the tendered defendant as a newly joined defendant—not as a traditional third party. Under this approach, the resulting jurisdictional problems are akin to those associated with the joinder of additional defendants.

The remainder of this Part discusses and evaluates whether court should treat tendered defendants like newly joined defendants when evaluating jurisdiction. To this end, it considers which bases of federal jurisdiction (independent and supplemental) might properly support the plaintiff's resulting claim against a tendered third party.

2. Analysis Applied to Independent Bases of Jurisdiction

Often an independent basis of jurisdiction will exist vis-à-vis the plaintiff and tendered third party. Indeed, rule 14(c) tendered-defendant claims are usually supported by an independent basis of federal jurisdiction;¹¹⁵ while courts are often silent as to the jurisdictional basis for rule 14(c) tendered-defendant claims,¹¹⁶ in most cases independent jurisdiction is,¹¹⁷ or appears to be,¹¹⁸ grounded in admiralty.¹¹⁹ Thus, in most tendered-defendant cases now arising under rule 14(c), the plaintiff's resulting action against the tendered third party would be cognizable in federal court regardless of the nature of the anchor claim.

Similarly, if the Federal Rules expanded the applicability of tendered-defendant practice to include all civil actions, an independent basis of jurisdiction likely would support most tendered claims. In those cases in which the tendered

113. See FED. R. CIV. P. 17(a); see also *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 256-58 (5th Cir. 1980) (real party in interest possesses the right sought to be enforced); *Mason-Rust v. Laborers' Int'l Union, Local 42*, 435 F.2d 939, 943-44 (8th Cir. 1970) (court defined real party in interest as party who suffered injury originally, despite reimbursement for the injury).

114. FED. R. CIV. P. 17(a). See generally C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 70, at 452 (4th ed. 1983) (discussing concept of real party in interest as one of three concepts to be considered for joinder of parties in federal courts).

115. See, e.g., *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 826 F.2d 424, 427 (5th Cir. 1987); *Fruta Oceanica Brasileira, S.A. v. M/V Alice St. Philip*, 790 F.2d 412, 417 (5th Cir. 1986); *Pacific Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229, 242-43 (5th Cir. 1985); *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 914 (7th Cir. 1983); *Riverway Co. v. Trumbull River Servs.*, 674 F.2d 1146, 1154-55 (7th Cir. 1982); see also, e.g., *In re Motor Ship Pac. Carrier*, 489 F.2d 152, 154 (5th Cir. 1974) (maritime nature of claims furnished independent jurisdictional basis).

116. See, e.g., *Coastal (Bermuda) Ltd.*, 826 F.2d at 427; *Fruta Oceanica Brasileira, S.A.*, 790 F.2d at 417; *Pacific Employers Ins. Co.*, 767 F.2d at 242-43; *Riverway Co.*, 674 F.2d at 1154-55.

117. See, e.g., *Oil Spill by Amoco Cadiz*, 699 F.2d at 914; *In re Motor Ship Pac. Carrier*, 489 F.2d at 154.

118. See, e.g., *Coastal (Bermuda) Ltd.*, 826 F.2d at 424; *Fruta Oceanica Brasileira, S.A.*, 790 F.2d at 417; *Pacific Employers Ins. Co.*, 767 F.2d at 242-43; *Riverway Co.*, 674 F.2d at 1154-55.

119. 28 U.S.C. § 1333 (1982) (conferring admiralty jurisdiction). No cases are reported in which a nonadmiralty independent basis of federal jurisdiction supports a rule 14(c) tendered-defendant claim.

claim presents a federal question,¹²⁰ or whenever all nonfederal-question defendants,¹²¹ including the tendered defendant, are of diverse citizenship from all of the plaintiffs,¹²² an independent basis of jurisdiction would support the plaintiff's tendered-defendant claim. Thus, even assuming that supplemental jurisdiction could never apply in tendered-defendant cases, it is unjustifiable to deny the direct-tender option simply because in a hypothetical minority of cases, the courts might have to dismiss tendered-defendant claims for the lack of subject-matter jurisdiction.

3. Analysis Applied to Supplemental Bases of Federal Jurisdiction

When a plaintiff's tendered claim against a third party lacks an independent basis of jurisdiction, courts must consider whether a supplemental basis of jurisdiction can support the properly joined claim or whether the claim must be dismissed for lack of subject-matter jurisdiction. Because tendered-defendant practice furthers judicial economy and encourages settlement, supplemental jurisdiction arguably should attach to all tendered claims, just as it attaches to cross-claims, compulsory counterclaims, and indemnity third-party claims.¹²³ But, unfortunately, under current doctrine supplemental jurisdiction might not attach. The Supreme Court's 1978 opinion in *Owen Equipment & Erection Co. v. Kroger*,¹²⁴ and its opinion last term in *Finley v. United States*,¹²⁵ may foreclose the applicability of supplemental jurisdiction to tendered-defendant claims.

The term "supplemental jurisdiction" is a general term that correlates the three separate but related concepts of pendent, ancillary, and pendent party ju-

120. See 28 U.S.C. § 1331 (1982). The citizenship of a *federal question* tendered party is irrelevant; even if the plaintiff's anchor claim is based on diversity jurisdiction, federal question jurisdiction can support the plaintiff's tendered claim against nondiverse parties. Moreover, the presence of such a nondiverse tendered party does *not* defeat jurisdiction over other state law claims against diverse defendants. This is true despite the fact that the tendered party's citizenship would seem to defeat the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063 (5th Cir. Unit A May 1981) (Randall, J.) (discussing and applying *Romero*); see also *Brown v. Mine Safety Appliances Co.*, 753 F.2d 393 (5th Cir. 1985) (complete diversity not destroyed by nondiverse defendant over whom there exists an independent basis of *federal question* jurisdiction); *Thibodeau v. Foremost Ins. Co.*, 605 F. Supp. 653 (N.D. Ind. 1985) (same). See generally 13B C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3605, at 400 (1984 & Supp. 1989) ("Of course, the rule of *Strawbridge v. Curtiss* does not require dismissal of claims against nondiverse defendants if the plaintiff has an independent basis of [federal question] jurisdiction over them.") (citations omitted). This rule applies only to "federal question" defendants; it does *not* apply to "admiralty" defendants. See *infra* note 121.

121. This includes "admiralty defendants" before the court under 28 U.S.C. § 1333 (1982). An "admiralty defendant" is technically *not* a "federal question defendant." See *Powell*, 644 F.2d at 1068. Thus, such a defendant's presence can defeat complete diversity jurisdiction over state law claims against other defendants. *Id.* at 1071.

122. See 28 U.S.C. § 1332 (1982); see also *Strawbridge*, 7 U.S. (3 Cranch) at 267 (requiring complete diversity between plaintiffs and defendants).

123. Like cross-claims, compulsory counterclaims, and indemnity third-party claims, tendered-defendant claims necessarily arise out of the same operative facts as the anchor claim. See *FED. R. CIV. P.* 14(c). Presumably a "transaction or occurrence" requirement would also be carried over into any civil practice tendered-defendant provision.

124. 437 U.S. 365 (1978).

125. 109 S. Ct. 2003 (1989).

risdiction.¹²⁶ Although courts¹²⁷ and commentators¹²⁸ have recognized the marked similarity of the doctrines, they remain analytically distinct bases of federal subject-matter jurisdiction. A pendent jurisdiction situation traditionally occurs when a plaintiff asserts against the defendant additional nonfederal claims arising out of the same nucleus of operative fact as the federal claim for which she is suing the defendant.¹²⁹ A pendent party situation also deals with nonfederal claims asserted in a predominately federal question/admiralty action.¹³⁰ Unlike pendent jurisdiction, however, pendent party claims are asserted against, and require the joining of, additional nonfederal-question defendants. Pendent party jurisdiction thus involves a plaintiff's claim against one party that

126. See generally Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 34 (1987) (discussing confusion regarding supplemental jurisdiction and suggesting a principled approach to the question of statutory authorization of supplemental jurisdiction). All of these supplemental bases of jurisdiction have a discretionary element. That is, even if a court has the power to exercise supplemental jurisdiction over a claim, it may in its discretion decline to do so if there are countervailing considerations of "judicial economy, convenience, fairness and comity." *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614, 618-19 (1988) (discussing *Gibbs*, 383 U.S. at 715; see also *Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809, 814 (5th Cir. 1989) (court has discretion to deny jurisdiction over state law claims and may refuse to extend pendent-party jurisdiction). This discussion does not address the discretionary element of supplemental jurisdiction. Rather, it considers only the scope of the federal courts' power to entertain such claims.

127. Prior to *Finley v. United States*, 109 S. Ct. 2003 (1989), the Supreme Court discussed the similarity of the doctrines. Freer, *supra* note 126, at 34 n.1 (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 n.8 (1978) (recognizing that ancillary and pendent jurisdiction stem from the same problem) and *Aldinger v. Howard*, 427 U.S. 1, 13 (1976) (finding "little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction")). But the *Finley* majority rejected the opportunity to assimilate these separate bases of supplemental jurisdiction into a unified doctrine. Indeed, because the Court flatly rejected the pendent party jurisdiction doctrine but not the ancillary and pendent jurisdiction doctrines, 109 S. Ct. at 2008-10, the distinction among the three is now more important than ever. See *infra* text accompanying note 134.

128. Freer, *supra* note 126, at 34 n.1 (citing Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 150-57 (1983); Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1937 (1982); Note, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263, 1271-87 (1975); see also Note, *Unraveling the 'Pendent Party' Controversy: A Revisionist Approach to Pendent and Ancillary Jurisdiction*, 64 B.U.L. REV. 895, 900 (1985) (discussing the difference between pendent and ancillary jurisdiction).

129. Freer, *supra* note 126, at 34 n.1 (citing J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 2.14, at 77-78 (1985); Matasar, *supra* note 128, at 117-18); see also *Baylis v. Marriott Corp.*, 843 F.2d 658, 665 (2d Cir. 1988) (refusing to exercise pendent jurisdiction over state law claim).

130. The doctrine of pendent party jurisdiction is pertinent *only* in federal question and admiralty actions; it is essentially inapplicable in diversity actions because of the aggregation of claims rule and the complete diversity requirement of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

The plaintiff in a diversity action can seek judgment against a third party only if there exists an independent basis of federal jurisdiction (either federal question, admiralty, or complete diversity) over that claim. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978). There are at least two procedural circumstances in which this issue could arise: (1) when the diversity plaintiff amends her complaint to seek judgment against a third party, or (2) when the defendant directly tenders a third party to the plaintiff and demands judgment in favor of the plaintiff. Under the present Federal Rules, the second scenario never could arise in a diversity case; rule 14(c)'s tendering provision is applicable only when the anchor claim is based on federal admiralty jurisdiction. See, e.g., FED. R. CIV. P. 9(h); see *supra* note 12 and accompanying text. Nevertheless, if the Federal Rules were amended to permit tendered-defendant impleader in all civil cases, the resulting diversity jurisdictional issues would be no more problematic than those that now arise in *Kroger* situations (that is, when the plaintiff amends her complaint to sue a third-party defendant directly).

lacks an independent basis of federal jurisdiction, but that arises out of the same nucleus of operative facts as the plaintiff's federal-question or admiralty claim against a different party.¹³¹ Ancillary jurisdiction potentially encompasses claim or party joinder instituted by any party or nonparty other than the original plaintiff against a party named in her complaint.¹³² It is "mainly a tool for defendants and third parties whose interests would be injured if their jurisdictionally insufficient claims could not be heard in an ongoing action in federal court."¹³³ Courts and commentators regularly employ these terms rather than the more generic term "supplemental jurisdiction."

Because *Finley* arguably buried the pendent party doctrine, the distinction between these three subcategories of supplemental jurisdiction has become absolutely critical.¹³⁴ This distinction is especially crucial in tendered-defendant practice.¹³⁵ Obviously pendent jurisdiction plays no role in tendered-defendant practice; the posture of a tendered claim is not that of a nonfederal claim asserted by a plaintiff against an original defendant. But both ancillary and pendent party jurisdiction are potentially implicated in tendered-defendant impleader. Which of these two doctrines courts should apply, however, and the consequences of that choice, are less certain. To understand these issues more fully, it is necessary to analyze supplemental jurisdiction both in the diversity and nondiversity anchor claim contexts.¹³⁶

131. See *Baylis*, 843 F.2d at 664. See generally *Currie, Pendent Parties*, 45 U. CHI. L. REV. 753, 753-55 (1978) (discussing whether pendent jurisdiction in federal question cases extends to nonfederal claims against additional defendants); Annotation, *Pendent Jurisdiction of Federal Court Over State Claim Against Party Not Otherwise Subject to Federal Jurisdiction Where State Claim is Sought to be Joined With Claim Arising Under Laws, Treaties, or Constitution of United States* ("Pendent Party" Jurisdiction), 72 A.L.R. FED. 191, 197-98 (1985 & Supp. 1987) (discussing pendent party jurisdiction).

132. See *Freer*, *supra* note 126, at 34-35.

133. *Baylis*, 843 F.2d at 663; see also *Freer*, *supra* note 126, at 34 n.1.

134. Conceivably, had the courts never recognized a distinction between pendent party and other types of supplemental jurisdiction, the issue addressed in *Finley* never would have arisen.

135. The distinction is crucial, not only as it now exists in admiralty, but also as it might exist if tendered defendant practice were adopted in civil practice generally.

136. A few commentators have addressed supplemental jurisdiction issues in the context of admiralty tendered-defendant practice under rule 14(c). See, e.g., *Landers, By Sleight of Rule: Admiralty Unification and Ancillary and Pendent Jurisdiction*, 51 TEX. L. REV. 50 (1972); Comment, *Ancillary Jurisdiction in Admiralty: Smooth Sailing for Impleading of Non-Maritime Causes of Action*, 17 INTER-AM. L. REV. 275 (1986) [hereinafter *Smooth Sailing*]; Comment, *Third-Party Practice in Admiralty: Ancillary Jurisdiction*, 28 SW. L.J. 1021 (1974) [hereinafter *Admiralty Ancillary Jurisdiction*]; Note, *Impleader of Nonmaritime Claims Under Rule 14(c)*, 47 TEX. L. REV. 120 (1968) [hereinafter *Nonmaritime Claims*]; Comment, *Pendent Jurisdiction in Admiralty*, 1973 WIS. L. REV. 594 [hereinafter *Pendent Jurisdiction*]; Comment, *supra* note 4; Note, *Pendent Jurisdiction in Admiralty*, 18 WAYNE L. REV. 1211 (1972) [hereinafter *Pendent Jurisdiction in Admiralty*]. These commentators, however, have not only failed to elucidate the problems adequately, but they also have become mired in irrelevant and confusing accessory issues. See *Briggs v. Town of Brewster*, 1989 A.M.C. 752, 756 (D. Mass. 1988). For example, the problem whether to extend the right to a jury trial in a third-party claim should not affect subject-matter jurisdiction. *Id.* Whether a jury trial is appropriate is jurisdictionally irrelevant. Cf. *Finley v. United States*, 109 S. Ct. 2003, 2018 n.24 (1989) (Stevens, J., dissenting) (discussing the irrelevance of accessory issues to a federal jurisdiction analysis).

- a. Supplemental jurisdiction when the anchor claim is based on diversity jurisdiction

Since 1946, rule 14 has not permitted tendered-defendant impleader when the plaintiff's anchor claim is based on diversity jurisdiction.¹³⁷ Still, if the Rules did permit it, there would be no jurisdictional problem if the original defendant and tendered defendant were both diverse from the plaintiff (and the claim[s] against each defendant exceeded \$50,000); an independent basis of diversity jurisdiction would support the tendered claim. In the absence of complete diversity, however, a supplemental basis of jurisdiction would be necessary to salvage the tendered claim. Unfortunately, the Supreme Court's decision in *Owen Equipment & Erection Co. v. Kroger*¹³⁸ may foreclose this possibility.

A tendered-defendant rule only procedurally permits a plaintiff's claim against a tendered third-party defendant—it does not grant subject-matter jurisdiction over the claim.¹³⁹ Thus, if one assumes that courts should analyze jurisdiction over tendered-defendant claims vis-à-vis the plaintiff and the third party, then tendered-defendant cases appear to present supplemental jurisdiction problems analogous to those arising when a plaintiff either brings such a claim under rule 14(a)¹⁴⁰ or amends her complaint under rule 15 to add such a claim.¹⁴¹ In *Kroger* the Court squarely addressed this jurisdictional issue in the diversity anchor-claim context. There, the plaintiff sued the original defendant for a state law claim falling within the court's diversity jurisdiction. The original defendant then impleaded for indemnity or contribution a third party who was not diverse from the plaintiff. Later, the plaintiff voluntarily amended her complaint to assert a direct claim against the nondiverse third party.

The *Kroger* Court found no independent jurisdictional grounds to support the plaintiff's newly added claim against the third party; federal question jurisdiction was unavailable because the plaintiff's claim was based on state law, and diversity jurisdiction was unavailable because the third party was a citizen of the same state as the plaintiff.¹⁴² More significantly, however, the *Kroger* Court found no supplemental basis of jurisdiction to support the plaintiff's claim against the third party. Dismissing that claim for lack of jurisdiction, the Court held that the diversity jurisdiction statute¹⁴³ does not confer supplemental juris-

137. Compare FED. R. CIV. P. 14(c) (providing for tendered-defendant impleader in rule 9(h) admiralty cases) with *id.* rule 14(a) (not providing for tendered-defendant impleader in general civil actions). Because tendered-defendant impleader is unavailable in diversity cases, the supplemental jurisdiction issues that might arise in that context are purely hypothetical.

138. 437 U.S. 365 (1978).

139. See FED. R. CIV. P. 82 (The Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein").

140. *Id.* 14(a). Rule 14(a) provides that "[t]he plaintiff may assert any claim against the third-party defendant arising out of the same transaction or occurrence." *Id.* (emphasis added).

141. For a discussion of why courts should approach tendered-defendant jurisdictional issues vis-à-vis the third-party defendant and the plaintiff, see *supra* notes 94-114 and accompanying text.

142. *Kroger*, 437 U.S. at 373-76. The district court had summarily dismissed the original diverse defendant, making *Kroger* even more problematic. This dismissal in effect left two citizens of the same state as the only litigants in a purely state law case.

143. 28 U.S.C. § 1332(a)(1) (1982).

diction¹⁴⁴ over a plaintiff's claim against nondiverse third parties.¹⁴⁵

One can make a strong argument that the Court decided *Kroger* wrongly. The *Kroger* majority based its holding entirely on the perceived absence of congressional authorization for jurisdiction. It reasoned that to allow ancillary jurisdiction over a plaintiff's state law claim against a nondiverse third party would be to skirt the long-existing complete diversity requirement, which the Court—not Congress—devised in 1806.¹⁴⁶ Even if the complete diversity requirement is a sensible interpretation of the diversity jurisdiction statute,¹⁴⁷ extending ancillary jurisdiction to a plaintiff's newly-added claim against an existing rule 14(a) third party would not diminish any congressional goals. Considering the preference that both Congress and the courts have consistently shown for promoting judicial economy and encouraging settlement,¹⁴⁸ the Court's reluctance to extend supplemental jurisdiction to a plaintiff's claim against an existing third party seems squarely contrary to any discernible congressional intent.¹⁴⁹

Nevertheless, *Kroger* is the law. And the Rehnquist Court appears unwilling to reconsider it anytime soon. Indeed, the Court's decision last term in *Finley v. United States*¹⁵⁰ suggests that, if anything, the Court is more likely to entrench its anti-supplemental jurisdiction position than to retreat from it.

Although *Kroger* is the law, its relevance in the tendered-defendant context is uncertain. Because tendered-defendant impleader has not been procedurally available in civil cases since 1946, no modern court has considered whether *Kroger* would preclude the exercise of supplemental jurisdiction over a plaintiff's nonfederal claims against a nondiverse tendered third party. Nonetheless, if the relationship between the plaintiff and the *tendered* defendant is the jurisdictionally relevant one (as seems logically appropriate¹⁵¹), then *Kroger* strongly suggests that supplemental jurisdiction would be unavailable in the diversity anchor claim context. If so, and if the Rules were amended to permit tendered-defendant practice in civil cases, Congress should correct *Kroger*'s contrived limitation on supplemental jurisdiction, at least in the tendered-defendant context. After all, this restriction disserves widely recognized goals of federal practice while furthering none.

144. The court employed the term "ancillary" jurisdiction rather than "supplemental" jurisdiction. See *Kroger*, 437 U.S. at 373-76.

145. *Kroger*, 437 U.S. at 373-74; see also *Finley*, 109 S. Ct. at 2007-08 (discussing *Kroger*).

146. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

147. 28 U.S.C. § 1332 (1982).

148. See *supra* notes 66-72 and accompanying text.

149. For an extensive argument that the Court's *Kroger* decision was unprincipled and unjustifiably limited the application of supplemental jurisdiction, see Freer, *supra* note 126 at 67-77.

150. 109 S. Ct. 2003 (1989). This Article discusses *Finley* in more detail below. See *infra* notes 180-201 and accompanying text.

151. See *supra* notes 94-114 and accompanying text.

- b. Supplemental jurisdiction when the anchor claim is based on federal question or admiralty jurisdiction.

Tendered-defendant impleader has long existed in admiralty procedure.¹⁵² Thus, maritime third-party practice provides a useful analytical framework within which to discuss supplemental jurisdiction issues that could arise if the Rules were amended to permit tendered claims in general federal question cases.

Prior to the 1966 unification of admiralty and civil practice, admiralty actions were wholly distinct from civil actions. Federal courts entertained only civil claims on the "civil side" of the court (where the right to jury trial existed) and only admiralty claims on the "admiralty side." Although it was unclear whether the reason was jurisdictional, procedural, or both, this wall was virtually impenetrable. Admiralty courts even refused to hear civil counterclaims that civil courts would have considered to be compulsory.¹⁵³ Likewise, admiralty courts often categorically refused to hear nonadmiralty third-party claims—even those having an independent basis of jurisdiction.¹⁵⁴

When the Federal Rules merged admiralty and civil practice in 1966, they broke down this wall. The joinder provisions of the resulting Federal Rules now apply to *all* cases and allow litigants to join nonadmiralty claims with admiralty claims in a single action.

From a jurisdictional standpoint, when an independent basis of jurisdiction supports a nonadmiralty claim properly joined with an admiralty anchor claim, no impediment exists to litigating both in federal court. Likewise, when a supplemental basis of jurisdiction supports a nonadmiralty claim properly joined with an admiralty anchor claim, no jurisdictional impediment should exist. Although this seems obvious, the fundamental applicability and scope of supplemental jurisdiction in postunification admiralty cases was initially uncertain.

The first postunification court to address this supplemental jurisdiction issue held that ancillary jurisdiction could never extend to nonadmiralty third-party claims in admiralty cases.¹⁵⁵ In that case, *McCann v. Falgout Boat Co.*,¹⁵⁶ Judge Noel of the Eastern District of Texas reasoned that because preunification nonadmiralty claims could not be heard under supplemental jurisdiction, neither could postunification nonadmiralty claims.¹⁵⁷

152. See *supra* notes 19-21 and accompanying text.

153. See, e.g., *Armour & Co. v. Fort Morgan S.S. Co.*, 270 U.S. 253, 258-59 & n.1 (1926); *United Transp. & Lighterage Co. v. New York & Balt. Transp. Line*, 185 F. 386, 389 (2d Cir. 1911); *The Yankee*, 37 F. Supp. 512, 514 (E.D.N.Y. 1941); see also, e.g., *Landers, supra* note 136, at 62-63 (discussing the reluctance of admiralty courts to find jurisdiction over nonadmiralty claims).

154. Some admiralty courts declined to hear nonadmiralty claims on jurisdictional grounds. E.g., *Armour & Co.*, 270 U.S. at 259 n.1 (Brandeis, J.) (dictum); *The Lake Galera*, 60 F.2d 876, 880 (2d Cir. 1932), cert. denied, 287 U.S. 670 (1933); *Transmarine Corp. v. Fore River Coal Co.*, 28 F.2d 624, 625 (D. Mass. 1928), *aff'd sub nom. Eastern Mass. Street Ry. v. Transmarine Corp.*, 42 F.2d 58 (1st Cir. 1930); *Capital Transp. Corp. v. Thelning*, 167 F. Supp. 379, 380 (E.D.S.C. 1958); *Warner v. The Gas Boat Bear*, 126 F. Supp. 529, 530 (D. Alaska 1955); see also *Landers, supra* note 136, at 60-61 (arguing that a broader reading of Admiralty Rule 56 should have been employed by the courts).

155. See *McCann v. Falgout Boat Co.*, 44 F.R.D. 34 (S.D. Tex. 1968).

156. 44 F.R.D. 34 (S.D. Tex. 1968) (Noel, J.).

157. *Id.* at 37-41. See generally *Smooth Sailing, supra* note 136, at 282-86.

Since *McCann*, however, courts generally have found ancillary jurisdiction available in admiralty cases to the same extent that it is available in civil cases.¹⁵⁸ Only two reported decisions since *McCann* have dismissed third-party claims for want of maritime¹⁵⁹ or admiralty¹⁶⁰ jurisdiction, and only one opinion expressly has refused to apply ancillary jurisdiction to support a tendered-defendant claim in an admiralty case; that opinion, like *McCann*, was authored by Judge Noel.¹⁶¹ Because the vast majority of courts addressing the issue since 1966 have allowed tendered-defendant impleader under ancillary jurisdiction,¹⁶² it now appears to be well settled that ancillary jurisdiction can support a plaintiff's direct claim against a tendered third party defendant in admiralty cases.¹⁶³ Thus, these decisions have implicitly rejected the pre-1946 view¹⁶⁴ that ancillary

158. See generally Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959) (analyzing the decision of *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and its impact on federal maritime jurisdiction); Landers, *supra* note 136, at 65 (proposing that federal jurisdiction is unitary and criticizing cases denying ancillary jurisdiction in admiralty). Moreover, commentators have almost uniformly criticized the reasoning and result of *McCann*. See Landers, *supra* note 136, at 67-69; *Smooth Sailing*, *supra* note 136, at 275; *Admiralty: Ancillary Jurisdiction*, *supra* note 136, at 1030-33; *Nonmaritime Claims*, *supra* note 136, at 120-22; *Pendent Jurisdiction*, *supra* note 136, at 602-03; *Pendent Jurisdiction in Admiralty*, *supra* note 136, at 1215-16; Note, *supra* note 4, at 1177-79.

159. *Smith v. Phillips Petroleum Co.*, No. Civ. A. 86-1432 (E.D. La. June 23, 1987) (WESTLAW, FADM-CS database) (Schwartz, J.) (without discussing other possible bases of federal jurisdiction, court dismissed the "14(c) tender" for want of "maritime jurisdiction").

160. *Bernard v. U.S. Lines*, 475 F.2d 1134, 1136 (4th Cir. 1973).

161. See *Stinson v. S.S. Kenneth McKay*, 360 F. Supp. 674, 676 (S.D. Tex. 1973) (Noel, J.). Recently, a district court declined to exercise ancillary jurisdiction in this context after discussing Judge Noel's reasoning in *McCann*. See *Briggs v. Town of Brewster*, 1989 A.M.C. 752, 755-56 (D. Mass. 1988). Whether that court relied specifically on *McCann* to reach this result is unclear. See *id.* at 756.

162. See *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1041 (5th Cir. 1982) ("[W]e hold that a third-party claim lacking independent grounds of jurisdiction may be appended to an admiralty action and is cognizable in federal court under the doctrine of ancillary jurisdiction so long as the ancillary claim arises out of the same core of operative facts as the main admiralty action."); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 810-11 (2d Cir. 1971) ("[T]he constitutional rationale which underlies the doctrine of ancillary jurisdiction in the context of . . . Rule 14 may be applied to support the conclusion that a federal court has the power to hear a related state claim against a defendant not named in the federal claim regardless of whether the federal claim arises in the civil or admiralty jurisdiction."); *Harcrest Int'l, Ltd. v. M/V Zim Keelung*, 681 F. Supp. 354, 357 (E.D. La. 1988) ("It is not necessary that this Court find an independent jurisdictional basis . . . since *Joiner* clearly permits ancillary jurisdiction over a 14(c) impleader."); *First Bank Southeast of Kenosha, Wis. v. M/V Kalidas*, 670 F. Supp. 1421, 1430-31 (E.D. Wis. 1987) ("The court has ancillary jurisdiction over the nonadmiralty and nonmaritime claims . . . brought pursuant to Federal Rule[] of Civil Procedure 14(c)."); *Trumble v. Packard, Inc.*, Civ. A. No. 84-3514 (E.D. La. June 10, 1987) (WESTLAW, FADM-CS database) (court found "ancillary jurisdiction over [Rule 14(c)] claim arising out of the same transaction or occurrence"); *Gibbs v. S/S Dona Paz*, 96 F.R.D. 599, 602 (E.D. Pa. 1983) ("Courts have construed Rule 14(c) as encouraging consolidated admiralty proceedings, going so far as to hold that a federal court presiding over a maritime action may under the principles of ancillary jurisdiction hear a related state claim against a person not named in the federal claim but connected to the matter at issue."); *Gauthier v. Crosby Marine Serv.*, 87 F.R.D. 353, 355-56 (E.D. La. 1980) ("I think the intent of the merger of the admiralty with the civil rules was to allow ancillary jurisdiction in admiralty impleader under Rule 14(c), preserving the substitute defendant practice unique to admiralty."); *Fawcett v. Pacific Far E. Lines*, 76 F.R.D. 519, 521 (N.D. Cal. 1977) (rule 14(c) claims "are cognizable under the doctrine of ancillary jurisdiction").

For an argument that *Finley v. United States*, 109 S. Ct. 2003 (1989), completely abrogated the doctrine of ancillary jurisdiction in the third-party practice context, see *supra* note 102.

163. Presumably, this would likewise be true in federal question cases if tendered-defendant impleader were permitted in that context.

164. See *supra* text accompanying notes 16-17 & 153-54 and accompanying texts.

jurisdiction does not attach to direct-tender claims. In so doing, they have further undercut this problem as a viable argument against permitting tendered-defendant practice in all federal question cases.

Nevertheless, if one properly distinguishes the concepts of ancillary and pendent-party jurisdiction, it is questionable whether courts *should* apply the *ancillary* jurisdiction doctrine in the tendered defendant context.¹⁶⁵ First, *Kroger* clearly reflects the Supreme Court's hostility toward applying ancillary jurisdiction to allow a plaintiff to recover from a party against whom he had no claim based on an independent jurisdictional ground. Second, and more significantly, the factual setting in direct-tender practice is virtually identical to that existing in the classic pendent party context.¹⁶⁶ The plaintiff's resulting claim in a tendered-defendant action strikingly resembles a tag-along state claim brought in a federal-question or admiralty action against a new defendant. Thus, the applicability of pendent party jurisdiction—not ancillary jurisdiction—in theory is more properly at issue in the tendered-defendant context.

Only one commentator has approached recognition of this. In 1976, Professor David Robertson of the University of Texas briefly noted, "Because 'substitute defendant' third-party practice involves a functional tendering of the third-party defendant to the original plaintiff, jurisdictional limits ought to be congruent with those applicable to joinder of parties."¹⁶⁷ Although other commentators have discussed tendered-defendant jurisdictional issues, none has recognized that the problem concerns pendent party rather than ancillary jurisdiction.¹⁶⁸

Likewise, only one court has recognized that it should address a plaintiff's tendered-defendant claim against a tendered third party as a pendent party juris-

165. Professor Moore also has concluded that ancillary jurisdiction should be unavailable in the tendered-defendant context. Although his conclusion is likely correct, he bases his argument on erroneous grounds. He states:

[I]n cases under Rule 14(c) where impleader is made on the ground that the third party is liable directly to the plaintiff, and there is no diversity between the plaintiff and third-party defendant or any independent federal jurisdiction of the claim, the validity of [applying ancillary jurisdiction] is doubtful in light of the Supreme Court's holding in the *Owen Equipment* case.

3 J. MOORE, *supra* note 2, ¶ 14.36, at 14-162 (citations omitted). But the limited statutory holding of *Kroger* does not directly affect rule 14(c) tendered-defendant practice. The *Kroger* Court based its decision wholly on the *statutory* requirement of complete diversity of citizenship in federal *diversity* actions. See *Kroger*, 437 U.S. at 377; see also Freer, *supra* note 126, at 69-74. As the Federal Rules are currently structured, there can be no rule 14(c) tendered-defendant claims in diversity cases; rule 14(c) applies *only* when the anchor claim is based on admiralty jurisdiction. See FED. R. CIV. P. 9(h); *id.* 14(a); *id.* 14(c). Therefore, *Kroger*'s limited "complete diversity" holding does not directly affect the applicability of ancillary jurisdiction to a plaintiff's rule 14(c) tendered-defendant claim.

166. See generally Currie, *supra* note 131, at 753-55 (discussing the necessary relationship of claims before pendent jurisdiction may be invoked); Annotation, *supra* note 131, at 191 (collecting and analyzing federal court cases discussing pendent party jurisdiction).

167. Robertson, *supra* note 10, at 1653-55. Professor Robertson goes on to suggest that " 'substitute defendant practice may be broadened more successfully through pendent jurisdiction.' " *Id.* at 1654.

168. See Landers, *supra* note 136, at 67-69; *Smooth Sailing*, *supra* note 136, at 275; *Admiralty: Ancillary Jurisdiction*, *supra* note 136, at 1030-33; *Nonmaritime Claims*, *supra* note 136, at 120-22; *Pendent Jurisdiction*, *supra* note 136, at 602-03; *Pendent Jurisdiction in Admiralty*, *supra* note 136, at 1215-16; Note, *supra* note 4, at 1177-79.

diction issue.¹⁶⁹ In *In re Oil Spill By the Amoco Cadiz*,¹⁷⁰ French citizens sued affiliates of Standard Oil Company for oil spill damages caused by the supertanker Amoco Cadiz when it foundered and sank off of the coast of France in 1978. Standard Oil then impleaded the shipbuilder, Astilleros Espanoles, under rule 14(c) and tendered Astilleros to the plaintiffs. Noting that it was questionable whether the plaintiff's products liability claim against the third-party shipbuilder fell within admiralty jurisdiction, the United States Court of Appeals for the Seventh Circuit considered applying a supplemental basis of jurisdiction. The court stated:

Since jurisdiction over [the plaintiffs'] claim against Amoco is incontestable, there probably is pendent jurisdiction over their claim against Astilleros arising from the same transaction. Although many recent decisions, including [a recent decision of this circuit] reject "pendent party" jurisdiction as a basis for allowing a diversity plaintiff to bring in an additional defendant against whom the plaintiff has a state law claim that does not satisfy the minimum amount in controversy requirement of the diversity statute, the admiralty setting is distinguishable.¹⁷¹

Apparently the court would have applied pendent party jurisdiction to the plaintiffs' rule 14(c) claim against the shipbuilder. But the court's discussion of this issue was dictum; it eventually found that the questionable claim fell within its admiralty jurisdiction.¹⁷²

Before the Supreme Court's 1989 decision in *Finley v. United States*,¹⁷³ in every circuit but one it was purely academic whether courts should characterize a plaintiff's tendered claim as a pendent party or an ancillary claim. Either way, most courts had jurisdiction. If improperly characterized as ancillary, tendered claims fell within the federal courts' supplemental ancillary jurisdiction.¹⁷⁴ If more properly characterized as pendent party claims, tendered claims usually remained within the courts' supplemental—pendent party—jurisdiction. This was so because every pre-*Finley* appeals court that considered the pendent party jurisdiction doctrine,¹⁷⁵ except the United States Court of Appeals for the Ninth

169. One court has reached an opposite result. In *Staffer v. Staten Island Hosp.*, 686 F. Supp. 400 (E.D.N.Y. 1988), Judge McLaughlin of the Eastern District of New York all but precluded the use of pendent party analysis in tendered defendant situations. He opined that pendent party jurisdiction covers only "[a] pendent party [who] has been joined 'at the behest of the plaintiff' to a federal question case." *Id.* at 401 (citing *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)). A tendered claim (which necessarily is joined at the behest of the defendant) could never raise pendent party issues under Judge McLaughlin's restrictive approach to the doctrine.

170. 699 F.2d 909 (7th Cir. 1983) (Posner, J.), *cert. denied*, 464 U.S. 864 (1983).

171. *Id.* at 913-14 (referring to *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1008-09 (7th Cir. 1982)) (other citations omitted).

172. *Id.* at 914. For a discussion of admiralty jurisdiction over such claims against shipbuilders, see Wonacott, *Products Liabilities of Shipbuilders and Repairers*, 62 TUL. L. REV. 465 (1988) (contribution to *Admiralty Law Institute Symposium: Products Liability in Admiralty*).

173. 109 S. Ct. 2003 (1989).

174. See *supra* notes 158-63 and accompanying text.

175. See, e.g., *Miller v. Griffin-Alexander Drilling Co.*, 873 F.2d 809 (5th Cir. 1989); *Feigler v. Tindex, Inc.*, 826 F.2d 1435 (5th Cir. 1987); *First Ala. Bank v. Parsons Steel, Inc.*, *rev'd*, 474 U.S. 518 (1986); *Bernstein v. Lind-Wallock & Co.*, 738 F.2d 179 (7th Cir. 1984); *Lykins v. Pointer, Inc.*, 725 F.2d 645 (11th Cir. 1984); *Stewart v. United States*, 716 F.2d 755 (10th Cir. 1982), *cert. denied*, 469

Circuit,¹⁷⁶ had recognized that it was viable¹⁷⁷—at least unless Congress clearly had demonstrated an intent to exempt the pendent party from being haled into federal court.¹⁷⁸ Thus, prior to *Finley*, a tendered-defendant claim arising out of the same nucleus of operative fact as an admiralty anchor claim always qualified

U.S. 1018 (1984); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *North Dakota v. Merchants Nat'l Bank & Trust Co.*, 634 F.2d 368 (8th Cir. 1980) (en banc); *F.D.I.C. v. Otero*, 598 F.2d 627 (1st Cir. 1979); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *see also Miller v. Griffin-Alexander Drilling Co.*, 685 F. Supp. 960, 965-66 n.5 (W.D. La. 1988) ("[E]very circuit which has considered [pendent party jurisdiction], except the Ninth, has extended the *Gibbs* rationale to pendent parties."), *aff'd*, 873 F.2d 809 (5th Cir. 1989); *Wicker v. First Fin. of La. Sav. & Loan Ass'n*, 673 F. Supp. 167, 169 n.2 (M.D. La. 1987) (listing cases from each circuit, except the Ninth, recognizing courts' discretion in accepting pendent jurisdiction). *See generally Currie, supra* note 131, at 754 ("Most courts of appeals that have considered the issue have had no difficulty extending *Gibbs* to cases in which an additional party not subject to the federal claim is brought in to answer a state one."); Annotation, *supra* note 131, at 191 (collecting and analyzing federal court cases discussing "pendent party" jurisdiction).

176. *See, e.g., Carpenter's S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999, 1000 (9th Cir. 1984); *Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir. 1977) (no pendent party jurisdiction exists in FTCA cases) (principle ultimately embraced by Supreme Court in *Finley*, 109 S. Ct. at 2009); *see also Puget Sound Prod. Credit Ass'n v. O/S Bold Lady*, 1985 A.M.C. 889, 890 (W.D. Wash. 1984) (court refused to apply pendent party jurisdiction in admiralty case) (citing *Safeco Ins. Co. of Am. v. Guyton*, 692 F.2d 551 (9th Cir. 1982)). *But see Princess Cruises Corp. v. Bayly, Martin & Fay, Inc.*, 373 F. Supp. 762, 765 (N.D. Cal. 1974) (In an admiralty case, district court opined that "pendent jurisdiction may be exercised even when it involves bringing in an additional party defendant.").

177. When a plaintiff brought an anchor claim under federal admiralty jurisdiction, many courts were especially disposed to apply the pendent party jurisdiction doctrine. *See, e.g., National Resources Trading, Inc. v. Trans Freight Lines*, 766 F.2d 65, 68 (2d Cir. 1985); *In re Oil Spill by Amoco Cadiz*, 699 F.2d 909, 913-14 (7th Cir.), *cert. denied*, 464 U.S. 864 (1983); *Leather's Best, Inc.*, 451 F.2d at 811; *Schexnider v. McDermott Int'l*, 688 F. Supp. 234, 239 (W.D. La. 1988); *Syndicate 420 at Lloyd's of London v. Glacier Gen. Assurance Co.*, 633 F. Supp. 428, 430-31 (E.D. La. 1986); *Lingo v. Great Lakes Dredge & Dock Co.*, 638 F. Supp. 30, 34 (E.D.N.Y. 1986); *Wood v. Standard Prods. Co.*, 456 F. Supp. 1098, 1103 (E.D. Va. 1978); *see also Princess Cruises Corp.*, 373 F. Supp. at 763-65 (not finding admiralty jurisdiction, court held pendent jurisdiction existed "even when it involves bringing in an additional party defendant."). For example, the United States Court of Appeals for the Seventh Circuit recognized that "pendent-party-defendant jurisdiction [is more compelling] in the admiralty field, where there is a strong policy of consolidating as many claims as possible in one forum." *Bernstein*, 738 F.2d at 187; *see also Oil Spill by the Amoco Cadiz*, 699 F.2d at 913-14 ("The tradition of liberal joinder . . . illustrates the strong admiralty policy in favor of providing efficient procedures for resolving maritime disputes.").

Even the pre-*Finley* Supreme Court seemed to be inclined toward allowing pendent party jurisdiction when the anchor claim fell within the exclusive jurisdiction of the federal courts (as many admiralty claims do). *See Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (dicta). Because of the savings-to-suitors clause of 42 U.S.C. § 1333 (1982), federal courts have concurrent jurisdiction with the state courts over some admiralty claims, while they have exclusive jurisdiction over others. *See generally F. MARAIST, ADMIRALTY 10* (2d ed. 1988) ("savings to suitors" clause grants to state courts "subject matter jurisdiction, concurrent with federal courts, over most maritime matters"). In circuits then recognizing pendent party jurisdiction only when the anchor claim fell within the exclusive jurisdiction of the federal courts, a seemingly anomalous situation could have arisen: rule 14(c) claims could have been supported by pendent party jurisdiction in exclusively federal admiralty cases, but not in those "saved" to "suitors."

178. *Aldinger*, 427 U.S. at 17-18. In *Aldinger* the plaintiff asserted a civil rights claim under section one of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1871), against a county administrator who had fired her. As the Supreme Court had up to then interpreted it, however, section 1983 did not create a cause of action against municipalities. *See Monroe v. Pape*, 365 U.S. 167, 187-92 (1961), *overruled*, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Thus, the plaintiff attempted to end-run *Monroe* by joining a state law claim against the county under the court's pendent party jurisdiction, despite the lack of an independent basis of jurisdiction. The Court expressly rejected pendent party jurisdiction over this state law claim because, in the Court's view, section 1983 demonstrated Congress' clear intent to exclude municipalities from suit in federal court. *See Aldinger*, 427 U.S. at 18-19.

for supplemental jurisdiction—unless the case was pending in the Ninth Circuit.¹⁷⁹ Likewise, if tendered-defendant practice had been available in federal question cases prior to *Finley*, tendered claims in those cases logically should have received similar jurisdictional treatment.

But after *Finley*, the applicability of supplemental jurisdiction to such claims is questionable. *Finley* considered whether supplemental jurisdiction extends in Federal Tort Claims Act¹⁸⁰ cases “to additional parties for whom an independent base [of jurisdiction] . . . is lacking.”¹⁸¹ After an elementary analysis of the constitutional and statutory sources of judicial power,¹⁸² the Court revisited its 1966 landmark decision in *United Mine Workers of America v. Gibbs*.¹⁸³ *Gibbs* was the Court’s first decision under the Federal Rules to recognize the legitimacy of supplemental jurisdiction over claims that arise out of the same “common nucleus of operative fact” as the jurisdiction-invoking claim.¹⁸⁴ *Gibbs* permitted such pendent claims among *parties already joined* in a federal question action. The *Finley* Court concluded, however, that *Gibbs* did not necessarily grant federal courts the power to hear nonfederal claims against *pendent parties*. Writing for the 5-4 majority, Justice Scalia opined that “[w]ithout spe-

179. Thus, whether a pre-*Finley* court considered a plaintiff’s tendered-defendant claim to fall within its ancillary jurisdiction or within its pendent party jurisdiction was of practical significance only in the Ninth Circuit. This practical significance is illustrated by *Fawcett v. Pacific Far E. Lines*, 76 F.R.D. 519 (N.D. Cal. 1977). In that case, a district court within the Ninth Circuit allowed a plaintiff to assert nonfederal tendered-defendant claims against a third party defendant “under the doctrine of ancillary jurisdiction.” *Id.* at 521. The *Fawcett* court would have had to dismiss the rule 14(c) claim if the court had more properly characterized it as a pendent party claim. *Cf. Puget Sound*, 1985 A.M.C. at 890 (Ninth Circuit does not sanction pendent party jurisdiction). Thus the proper jurisdictional characterization of a tendered claim, at least in the Ninth Circuit, was crucial not only from an academic standpoint, but from a practical one.

180. 28 U.S.C. § 1346 (1982).

181. *Finley*, 109 S. Ct. at 2005. The Court granted certiorari in *Finley* to resolve a conflict among the circuits on this issue. *See Metheny v. Hamby*, 109 S. Ct. 270, 271-72 (1988) (White, J., dissenting from Court’s denial of certiorari). In reality, this conflict was not one *among* the circuits, but one *between* the Ninth Circuit and all others.

182. *Finley*, 109 S. Ct. at 2005-06.

183. 383 U.S. 715 (1966).

184. The Supreme Court first recognized supplemental jurisdiction in *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1861), when it permitted third-party claimants to property confiscated by the government to intervene in the proceedings, even though their claims to the property had no independent basis of federal jurisdiction. *Id.* at 460-61. The courts have since given *Freeman* limited significance because if the Court had not recognized this supplemental “jurisdiction by necessity,” it would have denied the third-party intervenors due process; they effectively would have been denied the opportunity to claim entitlement to the seized property. *See C. WRIGHT, THE LAW OF FEDERAL COURTS* § 9, at 29 (4th ed. 1983). As one commentator has pointed out, however, due process did not require this result; due process could have been satisfied, and supplemental jurisdiction avoided, by dismissing the entire case under an indispensable party theory and allowing a state court to try the entire case. *See Freer, supra* note 126, at 50.

In 1926, the Court expanded the pre-Federal Rules availability of supplemental jurisdiction. That decision, *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926), recognized the legitimacy of using supplemental jurisdiction over compulsory counterclaims. *Id.* at 609. As Professor Freer notes: “Although an attentive reading of *Moore* does not disclose a conscious desire to expand the availability of supplemental jurisdiction, commentators and the lower courts have consistently read the case as opening the door for the exercise of ancillary jurisdiction justified by efficiency or convenience.” Freer, *supra* note 126, at 51-52. Thus, with *Moore* as constitutional support, the lower courts after 1938 liberally expanded the scope of supplemental jurisdiction (“common nucleus of operative fact”) to bring it and the new Federal Rules’ joinder (“same transaction or occurrence”) principles into close alignment. *Id.* at 52-53.

cific examination of jurisdictional statutes," *Gibbs* extended federal judicial power over a civil "action" to its full constitutional limit.¹⁸⁵ This, according to the *Finley* Court, was a "departure"—a departure that the Court said it did not intend to "limit or impair," but a departure that, at least in the Federal Tort Claims Act context, it "would not . . . exten[d] to the pendent-party field."¹⁸⁶

Finley's effect on tendered-defendant claims remains to be seen.¹⁸⁷ If the lower federal courts interpret *Finley* as an absolute, universal ban on pendent party jurisdiction,¹⁸⁸ then (again assuming that it is the plaintiff's relationship with the tendered defendant that is jurisdictionally significant) *Finley* apparently forecloses tendered-defendant practice in all admiralty or federal question actions when the tendered claim is not supported by an independent basis of jurisdiction. But of course this would be the case only if courts properly characterize tendered claims as presenting pendent party issues. Those courts improperly characterizing tendered defendant claims as ancillary (presumably because they consider tendered claims jurisdictionally identical to indemnity claims) probably would continue to have jurisdiction over all properly joined tendered claims arising out of the same operative facts as the anchor claim.¹⁸⁹ Given the important practical and policy advantages of liberal tendered-defendant practice, this approach, even if analytically questionable, might be a preferable alternative to employing the hostile approach to supplemental jurisdiction apparently mandated by *Finley*.¹⁹⁰

Nevertheless, if courts consider that tendered-defendant cases present pendent party issues, *Finley's* effect on tendered defendant impleader could be minimized in any of several ways. First, lower courts could distinguish and sharply limit *Finley's* holding. For example, if courts restricted *Finley* to Federal Tort

185. *Finley*, 109 S. Ct. at 2006.

186. *Id.* at 2010.

187. More fundamentally, its effect on pendent party claims in general remains to be seen.

188. See *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989). Considering the sweeping language used by Justice Scalia, this interpretation is not unreasonable: "All our cases—*Zahn*, *Aldinger*, and *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties. Our decision today reaffirms that interpretive rule." *Finley*, 109 S. Ct. at 2010. Furthermore, the analytical approach to pendent party jurisdiction that the *Finley* Court prescribes is heavily weighted against pendent party jurisdiction. *Finley* requires courts to interpret jurisdictional statutes narrowly against pendent party jurisdiction. Thus, unless Congress expressly states otherwise, courts probably should not allow pendent party jurisdiction. See *id.* at 2007 ("we . . . will not read jurisdictional statutes broadly"); see also *id.* at 2011 (Blackmun, J., dissenting). This approach is significantly more restrictive than that taken by the Court in *Aldinger*. Under an *Aldinger* analysis, jurisdictional statutes *presumptively* allowed pendent party jurisdiction unless "Congress has demonstrated an intent to exempt 'the party as to whom jurisdiction pendent to the principal claim' is asserted from being haled into federal court." *Id.* (Blackmun, J., dissenting) (quoting *Aldinger*, 427 U.S. at 16); see also *Binder v. Southeastern Historic Restoration, Inc.*, 711 F. Supp. 620, 623 (N.D. Ga. 1988) (court applied *Aldinger* and evaluated whether Congress had "negate[d] the existence of pendent party jurisdiction" over securities law claims). See generally *Bruce v. Martin*, 724 F. Supp. 124 (S.D.N.Y. 1989) (discussing different rules of statutory interpretation prescribed by *Aldinger* and *Finley*).

189. See *supra* notes 158-64 and accompanying text.

190. This assumes that ancillary jurisdiction, at least in the indemnity impleader context, remains viable and has not "been caught in the wide swath *Finley* cut into supplemental jurisdiction." *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772, 774 (E.D. La. 1989); see *supra* note 102.

Claims Act cases,¹⁹¹ it would affect only pendent party jurisdiction in tort suits against the United States. Thus, in the tendered-defendant context, it would limit only the United States' right to implead and tender third parties. Such an interpretation would leave intact the substantial body of circuit court case law recognizing pendent party jurisdiction under other, non-FTCA jurisdictional provisions such as those governing general federal question jurisdiction¹⁹² and admiralty jurisdiction.¹⁹³

Despite this possible limiting interpretation, it is unlikely that the Supreme Court or the lower courts will interpret *Finley* narrowly. Not only is Justice Scalia's language and approach to supplemental jurisdiction antagonistic, but his rule of statutory interpretation is unusually exacting.¹⁹⁴ Furthermore, considering that Federal Tort Claims Act cases fall within the federal courts' exclusive jurisdiction, *Finley* was a most attractive case for the Court to permit pendent party jurisdiction if it harbored any inclination to do so.¹⁹⁵ Perhaps the only chance is that courts will be reluctant to apply literally Justice Scalia's rigid language against applying supplemental jurisdiction to joined claims against new parties. After all, to do so likely would invalidate ancillary jurisdiction even in indemnity impleader cases.¹⁹⁶

Second, *Finley* obviously would be irrelevant if the Court overruled it. Indeed, a persuasive argument can be made that *Finley*'s "unnecessarily grudging"¹⁹⁷ approach to supplemental jurisdiction was statutorily and constitutionally unwarranted, as well as inefficient and counterproductive.¹⁹⁸ Why a closely divided Court saw fit in *Kroger* and *Finley* to undermine important policy principles that both it and Congress have embraced—principles of judicial economy and settlement promotion—is mysterious, especially considering that those cases had little political or ideological significance. To hold that "neither the convenience of litigants nor considerations of judicial economy can

191. Perhaps *Finley* merely establishes a "complete FTCA" requirement for 28 U.S.C. § 1346(b) (1982). This "complete FTCA" requirement might be roughly analogous to the *Strawbridge*-established "complete diversity" requirement for 28 U.S.C. § 1332 (1982). See *Finley*, 109 S. Ct. at 2008-10; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). Similarly, *Finley* arguably prohibits pendent party jurisdiction only under 28 U.S.C. § 1346(b) (1982), just as *Aldinger* prohibits pendent party jurisdiction only under 28 U.S.C. § 1343(a)(3-4) (1982), or as *Kroger* prohibits supplemental jurisdiction only under 28 U.S.C. § 1332 (1982). Thus, the lower courts are not necessarily bound by *Finley* in analyzing whether the general federal question statute, 28 U.S.C. § 1331 (1982), and the admiralty jurisdiction statute, 28 U.S.C. § 1333 (1982), permit pendent party jurisdiction.

192. 28 U.S.C. § 1331 (1982).

193. 28 U.S.C. § 1333 (1982).

194. See *supra* note 185-86.

195. See *Aldinger*, 427 U.S. at 18.

196. See *Huberman v. Duane Fellows, Inc.*, 725 F. Supp. 204 (S.D.N.Y. 1989) ("This court will not disavow years of impleader practice until clear signals are heard from courts above."). But see *Community Coffee Co. v. M/T Kriti Amethyst*, 715 F. Supp. 772, 774 (E.D. La. 1989) (district court apparently embraced Justice Scalia's sweeping language); *supra* note 102.

197. *Finley*, 109 S. Ct. at 2023 (Stevens, J., dissenting).

198. See, e.g., *Finley*, 109 S. Ct. at 2010-11 (Blackmun, J., dissenting); *id.* at 2011-23 (Stevens, J., dissenting, joined by Brennan and Marshall, J.J.). Many of Professor Freer's comments on the Court's flawed jurisdictional analysis in *Kroger* and *Aldinger* apply equally well to *Finley*. See Freer, *supra* note 126, at 61-77.

suffice to justify" the extension of supplemental jurisdiction¹⁹⁹ when nothing meaningful is gained by taking that view is an unprincipled approach. Indeed, it is an approach apparently founded on a separation of powers theory gleaned from a high school civics textbook.²⁰⁰ Nonetheless, reversal seems unlikely in the near future, especially considering that the *Finley* Court announced its position with unusually unequivocal and absolute language—albeit by a one-vote majority.

Third, regardless of whether the Court's statutory interpretation was correct, Congress could accept the *Finley* Court's entreaty and legislate in the area of supplemental jurisdiction. The Court's hint in this regard was less than subtle:

Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.²⁰¹

The enactment of a broad supplemental jurisdiction statute—one encompassing the contemporary doctrines of ancillary, pendent, and pendent party jurisdiction—clearly would be the preferable means to liberalize *Finley*'s restrictive approach. Not only would such congressional authorization appease the *Finley* majority, but it also would provide definitive assurance that federal courts have the power efficiently to resolve all properly joined factually related claims in a single federal question or admiralty lawsuit.

4. The Jurisdictional "Problem" in Perspective

This discussion to a certain extent substantiates that there is some jurisdictional complexity associated with tendered-defendant impleader. In light of *Kroger* and *Finley*, this complexity is particularly evident when the tendered claim lacks an independent basis of subject-matter jurisdiction. But any such problems are relatively insignificant and do not outweigh the practical and policy advantages of permitting tendered-defendant practice in all civil cases.

Why jurisdictional issues have stood as a longstanding barrier to liberal tendered-defendant practice is unclear. Jurisdictional concerns have not plagued other liberal joinder provisions of the Federal Rules. Indeed, at least two current joinder rules contemplate an independent basis of jurisdiction to support the joined claim. Rule 13(b) permits a defendant to join a counterclaim against a plaintiff even though his claim does *not* arise out of the same transaction or occurrence as the plaintiff's claim.²⁰² Because supplemental jurisdiction can never attach to such claims, rule 13(b) requires an independent basis of juris-

199. *Finley*, 109 S. Ct. at 2008 (quoting *Kroger*, 437 U.S. at 377).

200. For similar opinions reflecting Justice Scalia's overriding concern with separation of powers issues, see *Mistretta v. United States*, 109 S. Ct. 647, 675-83 (1989) (Scalia, J., dissenting alone); *Morrison v. Olson*, 108 S. Ct. 2597, 2622-41 (1989) (Scalia, J., dissenting); *United States ex rel. Vuitton*, 107 S. Ct. 2124, 2141-47 (1987) (Scalia, J., concurring in judgment).

201. *Finley*, 109 S. Ct. at 2010.

202. See FED. R. CIV. P. 13(b) ("A pleading may state as a counterclaim *any* claim against an

diction to give it effect.²⁰³ Similarly, rule 18(a) permits a party asserting any claim to join "as many claims . . . as the party has against an opposing party."²⁰⁴ Such claims can be entirely unrelated to the principal action and, as a result, in many cases must be supported by an independent basis of jurisdiction.²⁰⁵ But, that rule 18(a) and rule 13(b) claims sometimes require an independent basis of jurisdiction has not prompted the repeal of those rules' liberal joinder provisions. Likewise, that tendered claims sometimes may require an independent basis of jurisdiction alone cannot justify the continued unavailability of tendered-defendant practice in civil actions.

Moreover, any jurisdictional problems that may arise in the tendered-defendant context are not insurmountable. This is clearly demonstrated by current rule 14(c). Although rule 14(c) long has permitted tendered-defendant practice in admiralty cases, it has not caused maritime litigation to founder. Were the Rules amended to extend tendered-defendant practice to all civil cases, the resulting jurisdictional problems would be no more difficult to deal with than those that now arise in admiralty cases.

Finally, civil courts are already well acquainted with the jurisdictional problems arising when a plaintiff attempts to pursue a newly joined third party indemnitor under rule 14(a).²⁰⁶ The issues associated with this now-existing procedure are not wholly dissimilar from those that would arise in the tendered-defendant situation. Considering this, courts already possess the jurisprudential wherewithal to resolve tendered-defendant jurisdictional problems that arise in civil cases.

IV. CONCLUSION

The 1946 amendment to Federal Rule of Civil Procedure 14, which eliminated tendered-defendant impleader from general civil practice, was an unwarranted solution to a nonexistent problem. Despite the concerns of that amendment's proponents, the procedural and jurisdictional issues raised by direct-tender practice have never been intractable. Indeed, the availability of direct-tender impleader in admiralty cases ipso facto demonstrates the manageability of the practice. Procedurally, means exist to compel a plaintiff to pursue a tendered third party in the unlikely event that she is reluctant to do so. Jurisdictionally, tendered claims are often supported by an independent basis of subject-matter jurisdiction. That an independent basis may sometimes be absent

opposing party *not* arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.") (emphasis added).

203. An independent basis of jurisdiction is *always* required for a rule 13(b) permissive counterclaim because factual nonrelatedness is prerequisite to joinder under that rule. A factually nonrelated claim never can qualify for a supplemental basis of jurisdiction. *See, e.g., United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725-26 (1966).

204. FED. R. CIV. P. 18(a).

205. An independent basis of jurisdiction is required for a joined rule 18(a) claim if it happens to arise out of a different set of circumstances from the anchor claim. But, in contrast to rule 13(b), factually related claims *can* be joined under rule 18(a). Such claims may then qualify for "pendent claim" supplemental jurisdiction under *Gibbs*, 383 U.S. at 715.

206. *See supra* notes 137-51 and accompanying text.

is insufficient to justify a universal ban on this useful practice. Moreover, notwithstanding *Kroger* and the uncertain state of pendent party jurisdiction after the Supreme Court's 1989 *Finley* decision, tendered claims arising out of the same "transaction [or] occurrence"²⁰⁷ as the anchor claim should always qualify for supplemental jurisdiction when an independent basis is lacking.

But the Federal Rules should not retain tendered-defendant impleader in admiralty cases and resurrect it in general civil practice merely because it is unproblematic. Direct tender practice substantially furthers several important goals of the Federal Rules' broad joinder provisions: it helps to avoid circuity of action, multiple litigation, and inconsistent judgments, and it promotes settlement. Because tendered-defendant practice liberally encourages joinder of all potentially culpable parties, it effectively creates a single forum in which courts can resolve multiple claims against multiple parties in a single lawsuit, and increases the likelihood that all the parties will reach an out-of-court resolution.²⁰⁸

Furthermore, there is no justification for the Federal Rules' current distinction between admiralty and civil third-party practice. Many of the Rules' unique admiralty practice provisions are justifiable only because they address situations that arise peculiarly in maritime litigation. For example, the Rules establish specialized procedures for in rem actions against vessels and for limitation of liability proceedings.²⁰⁹ But no such maritime anomaly justifies the radical difference between rule 14(a)'s indemnity impleader provision and rule 14(c)'s unique direct-tender provision. Absent a rational basis for these divergent procedures, the goal of greater consistency in federal admiralty and civil practice²¹⁰ calls for a consistent approach to third-party practice. And because the important policies underlying direct-tender practice are no less compelling in civil litigation than in admiralty litigation, the Rules should readopt the now-existing admiralty practice in all civil cases rather than abrogate the practice altogether. Doing so not only would result in a more consistent body of federal practice rules, but also would serve the significant goal of avoiding multiplicitous federal litigation.

207. Tendered claims necessarily arise out of the same transaction or occurrence as the anchor claim. See FED. R. CIV. P. 14(c) (current rule provides for tendered-defendant impleader in the admiralty setting). Any nonadmiralty tendered-defendant provision presumably should carry over this "transaction or occurrence" requirement.

208. The goals underlying tendered-defendant impleader are equally compelling in the context of state court litigation. Therefore, states that presently do not permit direct tendering, see, e.g., LA. CODE CIV. P. art. 1111 (West 1984) ("defendant . . . may [only] bring in any person . . . who is or may be liable to him for all or part of the principal demand"), cited in *Shaffer v. Illinois Cent. Gulf R.R.*, 479 So. 2d 927, 929 n.2 (La. Ct. App. 1985), should consider amending their rules of third-party practice to allow it.

209. See Supplemental Rules for Certain Admiralty and Maritime Claims C & E (in rem procedures); *id.* rule F (limitation of liability procedures). Similarly, Federal Rule of Civil Procedure 38 addresses admiralty's penchant for nonjury trials. FED. R. CIV. P. 38(e).

210. This goal alone prompted the 1966 unification of admiralty and civil practice.

